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In The Supreme Court of the United States

LEN WALLACE, et al.,

Petitioners,

v.

STATE OF MONTANA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I

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QUESTIONS PRESENTED FOR REVIEW

1. When evaluating a regulatory taking under the Court's *Penn Central* factors, does presence in a highly regulated industry preclude the reasonableness of investment-backed expectations as a matter of law?

2. For the purpose of determining whether a regulatory taking has occurred under the *Penn Central* factors, what considerations are included in the "character of the governmental action" factor?

3. Is the "character of the governmental action" factor merely a rephrasing of the "economic impact" factor and limited to a consideration of the intrusiveness of the regulation?

4. Where state law allows a business to continue to provide its customers with a particular service, but new legislation limits the fees the business can charge to $0.00, thereby resulting in complete destruction of the business, is there a taking under this Court's *Penn Central* jurisprudence?

PARTIES TO THE PROCEEDING

This proceeding involves two Montana Supreme Court actions. Petitioners include the Plaintiffs in the first proceeding, Len and Pamela Wallace and their business, Big Velvet Ranch. Co-plaintiffs Bruce and Shirley Buhmann and Circle Eagle Game Farm are not Petitioners to this Court. Petitioners also include the Plaintiffs from the second proceeding, Kim J. Kafka and Cindy R. Kafka as husband and wife and as members of the Diamond K. Ranch Enterprises L.L.C. Petitioners also include Plaintiff-Intervenors in the second proceeding, Jack Bridgewater and Myra Bridgewater as husband and wife and as members of Phantom Bull Elk Ranch, L.L.C. Other Plaintiff-Intervenors, namely Jim and Barbara Bouma, are not Petitioners before this Court.

Respondents include the Defendants below in both proceedings, namely the State of Montana; the State's Attorney General, Mike McGrath; the Director of the State's Department of Fish, Wildlife and Parks (DFWP), Jeff Hegener; and the DFWP itself. Respondents also include Defendant-Intervenors from both cases below, Sportsmen for I-143 and Montana Wildlife Federation.

The only parent companies or wholly owned subsidiaries are the two limited liability companies identified above. Petitioners are unaware of whether there are any parent companies or wholly owned subsidiaries of the Defendants or Defendant-Intervenors.

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OPINIONS BELOW

The decision of the Montana Supreme Court in the Wallace matter is entitled *Buhmann v. Montana* and is reported at 201 P.3d 70, 348 Mont. 205 (2008), reproduced at Appendix (App.) 1-122. The decision of the Montana Supreme Court denying Petitioners' petition for rehearing was issued on February 10, 2009, and is reproduced at App. 397-398. The trial court's Findings of Fact and Conclusions of Law and Order is reproduced at App. 293-334.

The decision of the Montana Supreme Court in *Kafka v. Montana Department of Fish, Wildlife & Parks* is reported at 201 P.3d 8, 348 Mont. 80 (2008), and is reproduced at App. 123-292. The decision of the Montana Supreme Court denying Petitioners' petition for rehearing was issued on February 10, 2009, and is reproduced at App. 399-401. The trial court's Findings of Fact, Conclusions of Law and Decree is reproduced at App. 335-396.

JURISDICTION

The decisions of the Montana Supreme Court denying rehearing were entered on February 10, 2009. App. 397-398; 399-401. These cases draw into question the validity of a state statute, enacted by initiative as I-143 (appended as App. 402-410), on the ground that it is repugnant to the Constitution and laws of the United States. Therefore, this Court has

jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the takings clause of the Fifth Amendment to the United States Constitution:

> Nor shall private property be taken for public use, without just compensation.

Id.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution:

> Nor shall any state deprive any person of life, liberty, or property without due process of law.

Id.

STATEMENT OF THE CASE

Factual Background Common to All

From 1917 to this day, the State of Montana declares that game farm animals are private property. App. 296. Moreover, Montana law provides that the acquisition, breeding, harvest and sale of game farm animals is a lawful "business or occupation." 1917 Mont. Laws, ch. 173, § 84, *cited in* App. 188, ¶ 103. Game farm animals such as elk are also

termed "alternative livestock." Mont. Code Ann. § 87-4-406(1).

The primary purpose of acquiring and breeding elk is to sell to customers the right to enter the private ranch to hunt and shoot a trophy elk. This was the business of the Petitioners.

Because the Petitioners' game farms were extremely large, the shooting of game farm elk was similar to a hunting experience in the wild. However, Montana law remains very clear that laws applicable to hunting wild game animals do not apply to alternative livestock. *See* Mont. Code Ann. § 87-4-414(7). In short, roaming these large ranches looking for an opportunity to shoot privately owned elk is not considered "hunting" under Montana law.

For decades, Montana regulation of alternative livestock ranching consisted of requiring licenses, fencing, and recordkeeping of animals. Privately-owned elk must be maintained in captivity. *See* Mont. Code Ann. § 87-4-419(1). To prevent the transfer of disease between private elk and their wild counterparts, the state has established various reporting, testing, fencing, and transport regulations. App. 193, ¶ 109.

Until 2000, the state had **never regulated the price** one could charge for the shooting of privately owned elk at an alternative livestock ranch. Nor did the state even require alternative livestock ranches to obtain permission before charging fees for the

shooting of game on these ranches. That right was inherent in the private ownership of the animals.

The fee charged to shoot trophy elk was the primary source of income for alternative livestock ranches. Some ranches raised elk to supply herds to other ranches which sold the opportunity to shoot the game farm animals, thereby making fees charged for the shooting of elk the basis for their income as well.

Against this background, Montana voters in November of 2000 enacted Initiative No. 143 (I-143). This initiative was unabashedly intended to destroy the alternative livestock industry, but in a "carefully crafted" way so as to potentially avoid liability for a regulatory taking under the Fifth Amendment.[1]

I-143 (App. 402) made the following changes to Montana law. First, I-143 repealed Mont. Code Ann. § 87-4-431, which previously encouraged development of alternative livestock ranches. App. 409.[2] Second, it banned the transfer of game farm licenses. Third, and most importantly, it prohibited game farm ranches from charging a fee to customers who seek the opportunity to shoot privately owned elk. Although the

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[1] Justice Nelson, in his dissenting opinion in *Kafka*, quotes the argument of counsel for the Defendant-Intervenors who drafted I-143. App. 197, ¶ 114.

[2] Former Mont. Code Ann. 87-4-431 stated: "the production of alternative livestock provides a viable economic opportunity for any private property owner as well as the traditional livestock producers who are interested in diversifying their ranch productivity."

privately owned elk can still be shot, the owner cannot receive payment for providing that opportunity.

The results of I-143 were as they were intended – a complete obliteration of the game farm industry.

Factual Background Regarding the Wallaces

Len and Pamela Wallace (hereinafter "the Wallaces") moved to Ravalli County, Montana in 1991, and purchased 3,800 acres. App. 299. Thereafter, the Wallaces established a private elk ranch on the property, which they later named the Big Velvet Ranch.

Big Velvet Ranch began in 1992 after the Wallaces obtained a state game farm license. They then purchased material and equipment to build enclosures and facilities, removed all wild deer and elk from their property, installed fenced enclosures, imported elk purchased from elsewhere, and constructed a lodge on additional property they purchased to accommodate their customers. App. 299.

In order to keep elk within their property, the Wallaces constructed more than 25 miles of fencing (e.g., nine-foot fences with eight-foot high tensile mesh, as well as an electrified perimeter fence). App. 300. The state required game farms to have specialized handling facilities designed specifically for elk which were not useful in the handling of any other animals.

The Wallaces also purchased innovative tractor and truck equipment to install and maintain the fences. The Wallaces installed solar powered automated gates, and handling facilities and chutes. They also designed and developed a prototype feed truck that allowed one employee to deliver feed to more than 900 animals in a single day.

Elk are susceptible to tuberculosis and brucellosis. After a three-year testing process, Big Velvet Ranch was granted tuberculosis and brucellosis free certifications. App. 299.

Elk are also susceptible to Chronic Wasting Disease (CWD). There is no known method of testing live animals for CWD. App. 297. Accordingly, no herd could be certified as being CWD-free. Nevertheless, the Wallaces began voluntarily testing all dead animals on the ranch for CWD in 1998, before it became mandatory to do so. For four years thereafter, the Wallaces tested over 700 animals for CWD, all with negative results.

Big Velvet Ranch retained the services of veterinarians to care for the elk. Every elk on the ranch was inspected, wormed, blood tested, and assessed on an annual basis. A computer software system was developed specifically to chart and track the health conditions of each animal, and to comply with all state and federal regulations.

Guests of Big Velvet Ranch paid the Wallaces differing amounts depending on the sex of the elk and the size of the antlers, resulting in an average of

$7,000 for shooting a mature bull elk (e.g., over 5 years old). These customer payments for mature bull elk comprised the majority of Big Velvet Ranch revenues. Between 1995 and 2000, Big Velvet Ranch hosted more than 600 clients. From 1997 through 1999, the Wallaces annually harvested over 100 mature bulls on average.

On November 7, 2000, the date I-143 was enacted, the Wallaces owned over 850 elk. The fair market value of these elk was over $5.5 million dollars. App. 301. However, I-143 prohibited the Wallaces from selling their animals to clients for shooting. Faced with the high maintenance and feeding costs and no ongoing revenue stream, the best the Wallaces could do was salvage some of the elk for $238,000. App. 301. The Wallaces have been denied any public compensation. App. 297.

Factual Background Regarding the Kafkas

The Kafkas are long-time farmers and ranchers who own and lease real property in Hill County, Montana. App. 337. The Kafkas' farm and ranch operations at the time of passage of I-143 consisted of raising grain and beef cattle, and breeding and raising alternative livestock, primarily privately owned elk. App. 339.

Prior to applying for an alternative livestock ranching license, the Kafkas conducted extensive research into the alternative livestock industry, available markets for privately owned elk, and the

statutory and regulatory requirements then in effect for raising privately owned elk in Montana.

Like the Wallaces, the Kafkas invested significant capital to acquire privately owned elk, fences, licenses and facilities necessary to begin the alternative livestock operation. The Kafkas' business was specifically structured towards marketing animals to members of the public for shooting their elk. App. 340.

In 1999, the State issued a license to the Kafkas. Upon receiving the license, the Kafkas began to market their alternative livestock animals, mainly privately owned bull elk, for shooting at the Diamond K. Ranch. Prior to the passage of I-143, these animals were worth $5,000 to $6,000 each. App. 349. Their value in any limited out of state market was $1,700 to $1,800. App. 349.

The Kafkas' elk shooting operation was economically successful. The Kafkas were able to meet their short-term debt obligations with their bank, regain capital from the significant outlay for fencing expenditures, acquire additional animals for fee shooting purposes, and continue to expand their marketing efforts after only two years of selling elk shooting opportunities.

Upon passage of I-143, the Kafkas' previously legal and economically successful use of their alternative livestock animals was deemed illegal as the Kafkas could no longer receive a fee or any other remuneration for the shooting harvest of privately

owned elk on their property. In addition, as a result of I-143, any transfer of Kafkas' alternative livestock ranch licenses was prohibited. As a result of I-143, Kafkas' game farm business has no value whatsoever.

Factual Background Regarding the Bridgewaters

Jack and Myra Bridgewater operate an alternative game farm in Broadwater County, Montana. They operate under the name "Phantom Bull Elk Ranch, LLC." The Bridgewaters first became involved in the alternative game farm business in the early 1990s. App. 355.

Similar to the other Petitioners, the Bridgewaters received a state license to operate a game farm. App. 355. Their focus in the alternative game farm business was the development of trophy bull elk for shooting purposes.

Prior to I-143's enactment, the Bridgewaters received an average of $8,000.00 to $9,000.00 per bull elk. Following adoption of I-143, there is no Montana market for the animals. Although the Bridgewaters were able to find an out-of-state buyer for some of their animals, the price they obtained did not cover the cost of raising and caring for the animals. App. 177, ¶ 85.

As with the other Petitioners, the Bridgewaters invested significant capital in making improvements to their property which were unique to a game farm.

As a result of I-143, their business has been destroyed.

Proceedings before the Montana District Courts

In the Wallaces' case, the district court denied their request for a jury trial and bifurcated the liability and damages portion of the case. A bench trial was held from November 30, 2004 to December 2, 2004. The district court entered its decision that I-143 did not cause a taking of the Wallaces' property interests under either the Montana Constitution or the Fifth Amendment. App. 334. The Wallaces appealed to the Montana Supreme Court. Montana does not have an intermediate court of appeals.

The Kafkas brought an action in another county seeking compensation for the taking of their business. The Bridgewaters subsequently intervened. After a bench trial, the district court rejected their Fifth Amendment claims. *See* App. 396. The Kafkas and Bridgewaters appealed to the Montana Supreme Court.

Proceedings before the Montana Supreme Court

Hearings in the two cases were held on the same day, September 13, 2006. The court issued its decisions on the same day, December 31, 2008. In both cases, an identical four to three majority of the court held that no taking had occurred as a result of I-143.

The court's decisions both hinged on whether takings occurred based on the test announced by this Court in *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In *Penn Central*, this Court identified "several factors that have particular significance" in conducting the "essentially ad hoc, factual inquir[y]" into whether a particular governmental action constitutes a taking. 438 U.S. at 124. These factors include: "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Id.*

Regarding the investment-backed expectation factor, the Montana Supreme Court held that the Petitioners' expectations could not be reasonable as a matter of law. For instance, in the *Kafka* decision, the court initially recognized that Petitioners had investment-backed expectations that they could charge a fee to shoot elk. Indeed, such expectations formed the basis of investing "significant financial resources on their respective operations to begin with." App. 179, ¶ 89. Nevertheless, the court found that these expectations could not be **reasonable**. According to the majority, it was unreasonable to invest money expecting to be able to charge a fee for shooting elk because

> the state never assured appellants they would always be permitted to charge a fee to shoot livestock.

App. 182, ¶ 92.

The court in the Wallaces' case reached the same conclusion. After citing cases involving highly regulated industries, the court concluded that "claimants operating in such [highly regulated] fields should expect that the government can effectively regulate them out of business." App. 52-53, ¶ 84.

By contrast, the dissent in *Kafka* reasoned:

> Here, the Ranchers' investment-backed expectations certainly included the expectation that the regulatory scheme would be adjusted over time, as had been the case over the preceding 75 years. However, I-143 did not "adjust" the regulatory scheme; rather it rendered the scheme's existence entirely pointless, since none of the businesses in the industry can survive after I-143. I cannot agree with the Court's fanciful suggestion that the Ranchers should have expected the passage of such a regulation, i.e., one that would render all of the other existing regulations moot.

App. 263, ¶ 203; App. 266, ¶ 206.

The dissent continued its diametrically opposed view to the majority:

> The Court points out that "the State never assured [the Ranchers] they would always be permitted to charge a fee to shoot alternative livestock in Montana." Opinion, ¶ 92.
>
> With all due respect, the foregoing proposition is preposterous. The right to receive remuneration, in one form or another, for

> one's lawful goods and services has always been a part of this country's economic system. It is one thing to regulate the prices at which goods and services may be sold, but it is quite another to impose a price ceiling of $0.00. No business would, or should, *ever* expect that the State may require it to offer its goods and services for free.

App. 283, at ¶¶ 230-31 (emphasis in original, citations omitted).

The Montana Supreme Court also wrestled with what the "character of the governmental action" factor entailed. The court concluded that it referred only to the degree of intrusiveness of the government regulation.

> Thus, under the "character of the governmental action" prong courts should inquire concerning the magnitude or character of the burden imposed by the regulation, and determine whether it is functionally comparable to governmental appropriation or invasion of private property.

App. 170, ¶ 71.

More revealing is the court's application of that factor. In *Kafka*, the court concluded:

> [T]he type of intrusion upon the alternative livestock embodied by I-143 is **minimal**. The animals have not been seized by virtue of I-143 – they still belong to the appellants. Moreover, Appellants may still sell their animals to out-of-state markets for any usage,

> and may even allow others to shoot them in Montana, so long as no fee is charged. It is well-established that regulations which impair or **significantly decrease the profitable use** of property do not amount to a taking.

App. 178, ¶ 87 (emphasis added). The dissent notes the contradictory nature of describing the intrusion as "minimal" and claiming that the Ranchers

> "should have reasonably anticipated that the Game Farm industry might be phased out." . . . "Phasing out" an entire industry is certainly not the result one would reasonably anticipate from a regulation whose intrusion on property interests is "slight" and "minimally intrusive."

App. 201, ¶ 119 (quoting App. 182, ¶ 93).

Similarly, in the Wallaces' case, the court concluded:

> [T]hus, from the perspective of regulatory takings law, the character of the government action embodied in I-143 had a minimally intrusive effect on appellants' bundle of property rights in the alternative livestock.

App. 57, ¶ 91.

Regarding the economic impact factor, the trial court found and the Montana Supreme Court agreed that the economic impact on the Wallaces was significant. App. 323; *see also* App. 301 (97% reduction in value to the alternative livestock). In *Kafka*, the trial

court found that the economic impact was not "severe," but was nonetheless "substantial." App. 171-72, at ¶ 74. The ranchers had invested their income into development of the ranches and, therefore, had not yet shown a profit on their income taxes. The Montana Supreme Court, however, held:

> [W]e agree with appellants that the District Court underestimated the economic impact that I-143 had on their alternative livestock. Unlike their real estate interests, appellants' (sic) have demonstrated that their alternative livestock suffered a significant devaluation as a result of I-143.

App. 171-72, ¶ 84 (recognizing that the Kafkas' animals suffered a devaluation of 70% and the Bridgewaters suffered a devaluation of 95%). Nevertheless, the majority found no taking occurred.

The Dissent concluded that regulations

> may incidentally impact the value of businesses in the industry, they are not even remotely in the same league as I-143, which did not "regulate" alternative livestock ranches in the usual sense, but instead deliberately wiped out the economic viability of these businesses.

App. 264, ¶ 204. Hence, the dissent concluded that the economic impact factor "weighs *very heavily* in favor of the Ranchers' claims." App. 277, ¶ 221 (emphasis in original).

Petitioners filed separate petitions for rehearing two weeks later pursuant to Montana Supreme Court Rule 20. Chief Justice Karla Gray had retired at the time the Montana Supreme Court's decisions were issued. The petitions for rehearing were denied on February 10, 2009 by an evenly divided court, three to three, with no replacement for Chief Justice Gray to break the tie. App. 397, 400.

As evidenced by the Montana Supreme Court opinions in these cases, the federal question as to whether Petitioners had experienced an uncompensated taking under the Fifth Amendment originated with the original complaints they filed in state court and ended with the Montana Supreme Court's rejection of the claims. App. 8-9, ¶ 10; App. 131, ¶ 9.

REASONS FOR GRANTING THE WRIT

The Montana Supreme Court has decided important federal questions involving the Fifth Amendment's protection of rights in property. These decisions, however, conflict with precedents of other state and federal courts.

This Court's regulatory takings jurisprudence is often considered to have begun with *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), although some would argue that it significantly predates 1922.[3]

[3] *See* App. 214, ¶¶ 140-47 (Nelson, J. dissenting).

Nevertheless, *Mahon* recognizes that regulation is a modern necessity but still warns that regulation can go "too far" and result in a taking. *Id.* at 414-15.

Fifty-six years later, in *Penn Central,* the Court gave a framework for deciding whether regulation of private property goes "too far." That framework involves consideration of at least three factors.[4]

The strength of the multi-factor *Penn Central* test is its flexibility, borne out of the recognition that regulations come in a variety of shapes, sizes and intensity and apply to a variety of property interests which are correspondingly diverse. Hence, the analysis requires an "ad hoc factual inquiry." *Penn Central*, 438 U.S. at 124.

While the strength of the *Penn Central* multi-factor test may be its flexibility, that flexibility may also be its weakness. Its flexibility can be stretched so far out of shape that its application leads to no recognizable degree of predictability. While the ability to take into account a wide variety of facts is important, the *Penn Central* test must have enough clarity to lead to somewhat predictable results. Otherwise,

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[4] Legal scholars have argued that the *Penn Central* factors were not intended to be rigid categories, but rather "serve a modest, argument-framing function. Namely, the factors act more or less as placeholders, which help lawyers and judges to focus their arguments on a few considerations that everyone can understand." E. R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 343 (2006).

injustice results if one's constitutional rights depend completely upon the subjectivity of the decision-maker.

Judge Hall expressed a similar concern in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991):

> It is all too easy in a takings case to become enmeshed in the various tests, factors, and doctrines the Supreme Court has applied through the years. . . . The Court's "tests" are not rigid, unforgiving yardsticks to be slavishly applied notwithstanding a draconian result. On the contrary, the tests are guidelines for resolving the question at the bottom of every case: whether the claimant has been "forc[ed] . . . alone to bear [a] public burden [ ] which, in all fairness and justice, should be borne by the public as a whole."

Id. at 172 (Hall, J. dissenting) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Here, the complete destruction of businesses is a draconian result.

A well-fashioned test for the protection of constitutional rights must have some degree of predictability in order to ensure that one's rights are not completely at the mercy of the decision-maker. Here, the factual impacts of I-143 are not disputed, yet the justices on the Montana Supreme Court had widely differing views on whether the Fifth Amendment provides protection to Petitioners. Of course, nuances in constitutional theory may often be the subject of differing views. However, the result of I-143 was

unmistakable – obliteration of Petitioners' businesses in a completely unprecedented fashion. Nevertheless, a sharply divided court, using the same Fifth Amendment precedents, cannot come anywhere close to agreement on the constitutional implications. Further clarity in the *Penn Central* test is sorely needed, clarity which can only come from this Court.

This case presents an opportunity for the Court to provide the needed guidance and increased clarity to ensure justice – that one's rights do not depend completely upon the subjective views of the decision-maker who will decide one's rights.

I.

REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT CONFLICT AMONG STATE AND FEDERAL COURTS ON WHETHER BUSINESS OWNERS OPERATING IN A HIGHLY REGULATED INDUSTRY CAN EVER HAVE REASONABLE INVESTMENT-BACKED EXPECTATIONS UNDER *PENN CENTRAL*

The Montana Supreme Court concluded that Petitioners' investment-backed expectations could not be reasonable because they operated in a highly regulated industry. App. 180. This conclusion is completely at odds with several decisions of this Court and others. For instance, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), makes clear that the reasonableness of one's investment-backed expectations is influenced most by the nature of the regulations, not by a

superficial characterization of one's business as being within a "highly regulated" category of endeavors.

In *Ruckelshaus,* the Court was considering whether trade secrets were taken by an EPA regulation that mandated disclosure of pesticide formulas. Monsanto had claimed a taking of its trade secrets under regulations during two different time periods. This Court found that at the time the regulatory framework put Monsanto on notice that its trade secrets might be disclosed, the company had no reasonable investment-backed expectation of non-disclosure. Hence, no taking occurred during that regulatory timeframe. Conversely, when trade secrets were submitted to the EPA under a regulatory framework where confidentiality could be expected to be maintained, the owner had a reasonable investment-backed expectation that the trade secrets would remain just that – secret.

Significantly, this Court also found that the interference with investment-backed expectations in the latter category was so significant that a taking was found without regard to the other *Penn Central* factors, even though the pesticide manufacturing industry was undoubtedly highly-regulated. *Ruckelshaus*, 467 U.S. at 1005, 1013-14.

The Montana Supreme Court decisions also stand in direct conflict with cases decided by the Court of Appeals for the Federal Circuit, the first of which appears to be on all fours with the Petitioners'

situation – *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990).

In *Yancey,* turkey farmers sought compensation under the Fifth Amendment after a federally-imposed quarantine, premised upon disease prevention, prohibited the interstate shipment of turkeys. Several significant facts parallel the facts in the present cases. First, the Yanceys' turkeys were not diseased. *Id.* at 1536. Neither were Petitioners' elk. Second, the cost of keeping the turkeys alive was cost prohibitive, so the Yanceys sold the turkeys for slaughter and received $20,887 for the stock. *Id.* The Petitioners' elk quickly became a financial burden in that their value was less than the cost of maintaining them. App. 177, ¶ 85.

In deciding the taking question, the *Yancey* court relied on *Department of Agriculture v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla. 1988) (destruction of healthy citrus trees to avoid spread of disease was a compensable taking). *Yancey,* 915 F.2d at 1540.

The opinion below in the Wallaces' case attempted to distinguish *Yancey* by claiming that the Yanceys had "no reason to expect that a healthy flock of turkeys would have to be suddenly destroyed." App. 62, ¶ 98.

This statement is simply incorrect. A month before the Yanceys bought their flock, there was a serious outbreak of Avian Influenza in the region. 915 F.2d at 1536. Moreover, the federal government's authority to impose quarantines to control Avian

Influenza dated as far back as 1962. *Id.* at 1538. Clearly, the possibility of disease outbreaks was known to both the Yanceys and the Petitioners. However, when government regulation significantly devalues healthy animals, the Fifth Amendment applies differently in the Federal Circuit than in Montana.

The conflict among courts as to whether presence in a highly regulated field precludes a regulatory taking is also evident from the recent Federal Circuit decision in *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009).

In *Rose Acre*, the Federal Circuit found no taking of eggs which had been quarantined, primarily because the diminution in value was merely 10%. However, in addressing the reasonable investment-backed expectations factor, the Court held *Rose Acre* had reasonable investment-backed expectations even though it operated in a highly regulated industry because the new regulations supposedly causing the taking were "unprecedented." *Id.* at 1276. This decision is consistent with *Ruckelshaus*, but contrary to the approach used by the Montana Supreme Court.[5]

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[5] Other decisions follow the same path of reviewing the nature of regulations. *Cienega Gardens v. United States*, 331 F.3d 1319, 1350-51 (Fed. Cir. 2003); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1436 (Fed. Cir. 1990).

Although the Court distinguished *United Nuclear* from its earlier decision in *Allied-General Nuclear Services, Inc. v. United States*, 839 F.2d 1572 (Fed. Cir. 1988), the resolution of

(Continued on following page)

In the present case, it is undisputed that prior to passage of I-143, Montana had never regulated the fees for shooting privately owned elk. Nevertheless, the Montana Supreme Court concluded that game farms had become controversial, therefore, Petitioners should have known that the state could "outlaw Game Farms entirely." App. 182, ¶ 92. Of course, many businesses are controversial. That does not mean they can be effectively regulated out of existence without compensation.

The dissent in *Kafka* warned of the absurd and unfair result of the court's reasoning in other business endeavors, such as insurance, coal-fired electrical plants, gasoline, banks, and grain farmers. App. 264-65, ¶ 204. The potential list is unending.

Additionally, the Montana court's conclusion that there can be no regulatory taking under the Fifth Amendment when the industry is highly regulated conflicts with a long history of decisions recognizing that takings can occur when government regulates the prices charged by businesses, even in highly regulated industries.

At its essence, I-143 is a price control. It does not prohibit owning game farm animals. It does not

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takings cases in highly regulated fields appears to be all over the doctrinal map, leaving lower courts, regulators and property owners without paths to follow, let alone boundaries between broadly defined areas where the Fifth Amendment provides protection and where there is none.

prohibit keeping them in captivity. In fact, the requirement that game farm animals be kept separate from the State's free-roaming wild elk remains. It does not prohibit the shooting of game farm animals. Instead, it regulates the price which can be charged for shooting private elk and dictates that the dollar price be $0.00.

For over a century, this Court and others have recognized that price regulations may be lawful, but they can result in an uncompensated taking:

> This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.

Stone v. Farmers' Loan & Trust Co. (*Railroad Commission Cases*), 116 U.S. 307, 331 (1886).

More recently, the Seventh Circuit has explained:

> The argument that because railroads are heavily regulated their owners must put up with diminutions in value fares no better. Regulation may diminish the value of property without "taking" it. Railroads have long been subject to regulation that diminishes their profitability. But it does not follow that diminution by all means is permitted.

In re: Chicago, Milwaukee, St. Paul and Pacific R. Co., 799 F.2d 317, 325 (7th Cir. 1986) (citations omitted); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989) ("A rate is too low if it is 'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,' and in so doing 'practically deprive[s] the owner of property without due process of law.'" (quoting *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896))).

The Montana Supreme Court's explanation of how *Penn Central's* reasonable investment-backed expectations factor applies in highly regulated industries is completely contrary to the way this and other courts have historically analyzed the issue. The Court should grant the Petition to provide a more cohesive understanding of the role this factor plays in the analysis of takings claims to assist property owners, regulators and courts nationwide.

If this Petition were granted, Petitioners would argue that presence in a highly regulated industry does not preclude reasonable investment-backed expectations as a matter of law. Here, Petitioners' expectations were objectively reasonable because the regulation of prices was completely unprecedented and the state had explicitly encouraged the development of the industry I-143 destroyed.

II.

THE PETITION SHOULD BE GRANTED TO ADDRESS CONFLICTS AMONG LOWER COURTS REGARDING *PENN CENTRAL*'S "CHARACTER OF THE GOVERNMENTAL ACTION" FACTOR

In *Penn Central*, it appears that this Court's reference to the "character of the governmental action" may have originally involved looking to see whether the governmental action was a physical invasion or whether it was a regulatory burden. *See Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Central*, 438 U.S. at 124). However, *Penn Central* also recognized that a regulatory taking involved essentially "ad hoc, factual inquiries" and suggested that the three factors were not exclusive. 438 U.S. at 124. Courts should accordingly consider any facts which help one determine whether a particular burden "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 48.

The Montana Supreme Court's conclusion that the "character of the governmental action" factor is simply a reference to the degree of intrusion in property rights conflicts with the analysis of other courts.

As with the Court's descriptor of regulations that go "too far," the phrase "character of the governmental action" has left the courts, property owners and regulators with little understanding of what can and should be considered in determining whether just compensation must be paid.

The trial courts in these cases found the "character of the governmental action" factor to weigh against finding a taking because the regulation substantially advanced a legitimate governmental interest. App. 53, ¶ 85; App. 138, ¶ 21. The Montana Supreme Court recognized that approach was no longer valid after *Lingle*. App. 13, ¶ 16, n.2; App. 53, ¶ 85, n.5; App. 168-69, ¶¶ 70-71.

Nevertheless, other courts, even after *Lingle*, still inquire whether the regulation substantially advances a legitimate governmental interest. For instance, in *Rose Acre Farms*, 559 F.3d 1260, the Federal Circuit concluded that "character of the governmental action" referred to the purpose and importance of the governmental regulation *Id.* at 1278-81; *see also Cienega Gardens v. United States*, 503 F.3d 1266, 1279 (Fed. Cir. 2007) (referring to the strength of the governmental interest in the context of assessing the character of the governmental action); *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009) ("character of the governmental action" analysis involved consideration of the importance of the regulation's purpose).

If the effectiveness of a regulation in achieving an important governmental interest is outside the scope of deciding takings claims as *Lingle* indicates, then "character of the governmental action" factor cannot still involve review of the importance of the governmental purpose. Otherwise, the government could merely assert an extremely important, *i.e.*,

lifesaving, purpose to immunize its regulations from the Takings Clause.

Uncertainty of what constitutes the "character of the governmental action" factor unfortunately abounds. For instance, California and Minnesota courts appear to focus on the way in which the burdens are distributed as part of the "character of the governmental action" inquiry.

> We believe that the appropriate focus of the character inquiry should be on "the *nature* rather than the merit of the governmental action." *Small Prop. Owners of San Francisco v. City & County of San Francisco*, 141 Cal.App.4th 1388, 47 Cal.Rptr.3d 121, 136 (2006). Although the relevant considerations may vary depending on the circumstances of the case, an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners.

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 639 (Minn. 2007) (emphasis in original).

Petitioners agree that these considerations should be included in any takings inquiry. Of course, the Montana Supreme Court did not include meaningful consideration that I-143 singled out a particular business with relatively few participants and placed the entire economic burden of the new policy on their shoulders.

In the absence of direction from this Court, courts have developed widely different views on what the "character of the governmental action" inquiry actually involves. While the Montana Supreme Court purports to emphasize the impact on the property owner, its narrow focus precludes consideration of other facts which naturally influence common understandings of fairness and justice. Additionally, by focusing on the degree of intrusiveness alone, the "character of the governmental" action factor is relegated to a mere redundancy to the economic impact factor.[6]

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[6] The conclusion that I-143 had a minimal intrusive effect on Petitioners is inconsistent with the Montana Court's recognition that the economic impact was significant or substantial. App. 323; App. 71-72, at ¶ 74. However, the Court attempted to characterize the economic impact as being less severe by asserting that one's property rights in intangible business assets are entitled to no protection from the Fifth Amendment in the regulatory taking context, even though "intangible business assets are statutorily recognized forms of property in Montana." App. 157, ¶ 55 (citing Mont. Code Ann. § 70-1-104(4); *In re Marriage of Hull*, 712 P.2d 1317, 1320-21 (Mont. 1986)). The only circumstance in which intangible assets would be protected by the Montana judiciary is if the government acted "with the intent of operating a similar business." App. 158, at ¶ 56. This conflicts with this Court's oft-repeated maxim that the focus of the Fifth Amendment is not on what the government has gained, but on what the property owner lost. *Kimball Laundry v. United States*, 338 U.S. 1, 13 (1949) (citing *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)). The State's intent should have no bearing on whether these assets are compensable. *See* dissent, App. 272-73, ¶ 214.

If review is granted, Petitioners will argue that the "character of the governmental action" factor should include a variety of considerations. For instance, typical zoning regulations limit land use in a way which both enhances and restricts properties' values. *See Pennsylvania Coal*, 260 U.S. at 415 (noting that an "average reciprocity of advantage" was deemed to justify many laws). I-143 provided no benefits to game farmers – only a fatal financial burden that was imposed on them and them alone.

Petitioners will contend that the "character of the governmental action" involves review of any fact which tends to show that fairness and justice dictate that the cost of the regulation should be borne by the public as a whole.

The "character of the governmental action" factor does not simply consist of the degree of intrusiveness, nor is it a review of the importance of its purpose. Rather, this factor calls for a review of what the regulation actually does. As noted above, I-143 does not regulate the operation of game farms in any way other than prohibiting the transfer of the licenses and prohibiting the payment of money for shooting privately owned elk. This is what I-143 does. The regulation of fees to $0.00 supports the conclusion that Petitioners should be compensated for the destruction of their businesses.

CONCLUSION

Despite this Court's admonition that the primary factor among the *Penn Central* factors is the economic impact to the property owner, *Lingle,* 544 U.S. 539-40, the Montana Supreme Court has ignored this fundamental principle which comes from the very purpose of the takings clause. Instead, the Montana Supreme Court attempts to justify the devastating impact of I-143 on Petitioners by applying the other factors in ways which conflict with the approach of this, and other, Courts.

I-143 is not a regulation that raises the concern that "Government hardly could go on" if just compensation were required. *Mahon,* 260 U.S. at 413. As noted by the dissent in the Wallaces' case,

> It is one thing to strengthen fencing, testing, and reporting requirements through "additional restrictions," as the Legislature did over the years. But it is quite another to require alternative livestock ranchers to operate with no income through the expedient of prohibiting remuneration for the key economic activity on which their businesses depended: fee shooting.

App. 73, ¶ 116. No amount of stretching or constricting the other *Penn Central* factors should lead to the results adopted in Montana. Petitioners urge the Court to grant this Petition so that the Court may

add clarity and provide guidance on how the *Penn Central* factors are to be applied.

DATED: May 11, 2009

Respectfully submitted,

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348 Mont. 205, 201 P.3d 70 (2008)

Supreme Court of Montana.

Bruce BUHMANN, Shirley Buhmann, Circle Eagle Game Farm, Len Wallace, Pamela Wallace, and Big Velvet Ranch, Plaintiffs and Appellants,

v.

STATE of Montana, Mike McGrath, and Jeff Hagener, Defendants and Appellees, Sportsmen for I-143, Montana Wildlife Federation, Defendant-Intervenors and Appellees.

No. 05-473.

Argued Sept. 13, 2006.
Submitted June 20, 2007.
Decided Dec. 31, 2008.
Rehearing Denied Feb. 10, 2009.

Background: Owners and operators of alternative livestock game farms brought an action against the State alleging that initiative measure which prohibited fee-shooting on alternative livestock game farms and prohibited the transfer of alternative livestock licenses constituted a taking of their private property. After the Blaine County District Court granted State's motion for change in venue, following a bench trial the District Court of the First Judicial District, County of Lewis and Clark, Dorothy McCarter, P.J., entered judgment for the State. Owners appealed.

Holdings: The Supreme Court, Patricia O. Cotter, J., held that:

(1) State was entitled to change venue of action from county in which it was brought to county containing State capital;

(2) as a matter of first impression, owners were not entitled to a jury trial on issue of whether initiative measure constituted a regulatory or categorical taking;

(3) Montana Constitution did not provide any greater constitutional protection against the regulatory taking of private property than the Fifth Amendment to the United States Constitution;

(4) even if their categorical taking claims were cognizable, initiative measure did not result in a categorical taking of owners' alternative livestock and related equipment;

(5) economic impact factor of regulatory taking analysis weighed in favor of a finding of a compensable taking; but

(6) character of government action factor of regulatory taking analysis weighed against a finding of a regulatory taking; and

(7) reasonable investment-backed expectations factor of regulatory taking analysis weighed against a finding of a regulatory taking.

Affirmed.

Jim Rice, J., concurred in part and dissented in part, and filed opinion.

James C. Nelson, J., dissented and filed opinion, in which Wm. Nels Swandal, J., joined.

Wm. Nels Swandal, J., dissented and filed opinion.

See also 309 Mont. 473, 47 P.3d 847.

For Appellants: Arthur V. Wittich (argued), Wittich Law Firm, P.C., Bozeman, Montana, Richard M. Stephens (argued), Groen, Stephens & Klinge, LLP, Bellevue, Washington.

For Appellees: Hon. Mike McGrath, Montana Attorney General, Chris D. Tweeten, (argued), Assistant Attorney General, Helena, Montana.

For Defendant-Intervenors and Appellees: Jack R. Tuholske (argued), Tuholske Law Office, P.C., Sarah K. McMillan, Attorney at Law, Missoula, Montana.

Justice PATRICIA O. COTTER delivered the Opinion of the Court.

¶ 1 Bruce and Shirley Buhmann (Buhmanns), owners and operators of the Circle Eagle Game Farm, and Len and Pamela Wallace (Wallaces), owners and operators of the Big Velvet Ranch, appeal an order of the First Judicial District Court which denied their takings claims under the Fifth Amendment to the U.S. Constitution and Article II, Section 29 of the Montana Constitution. These claims alleged that the enactment and enforcement of initiative measure no. 143 (I-143), which was approved by the citizens of Montana on November 7, 2000, constituted a taking

of their private property and that they were entitled to just compensation for this taking. For the reasons set forth below, we affirm the District Court.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 The case at bar involves takings claims very similar to claims we recently addressed in *Kafka v. Mont. Dept. of Fish, Wildlife and Parks,* 2008 MT 460, 348 Mont. 80, 74 P.3d 8, 2008 WL 5413504. Insofar as the background information and our decision and reasoning in *Kafka* applies to the case at bar, we will refer to that case. Where the arguments and issues raised by the present appellants are distinct from those raised by the parties in *Kafka,* we will address their merits accordingly.

¶ 3 The appellants in this case were owners and operators of alternative livestock game farms (Game Farms) within the state of Montana. The Game Farm industry is premised on the notion that individuals are willing to pay significant amounts of money to shoot captive animals, primarily elk, within the confines of a Game Farm. Since 1917, it has been lawful for individuals to own alternative livestock, such as elk, and keep them in captivity. Game Farms are heavily regulated by the Montana Department of Fish, Wildlife, and Parks (FWP) because of the threat posed by chronic wasting disease (CWD), a fatal disease of the central nervous system of captive and free-ranging animals such as mule deer, white-tailed

deer, and Rocky Mountain elk. *Kafka,* ¶ 2. To operate a Game Farm, the owner/operator must possess an alternative Game Farm license and comply with the rigorous and extensive licensing requirements set forth in Title 87, chapter 4, part 4, MCA. *See Kafka,* ¶¶ 2, 8.

¶ 4 On November 7, 2000, the voters of Montana passed I-143, which made two significant changes to the regulation of Game Farms in Montana. *See Kafka,* ¶¶ 6-9. First, it prohibited fee-shooting on Game Farms in Montana. Second, I-143 prohibited licensees from transferring their alternative livestock licenses to others. These changes had a significant impact on the Game Farm industry in Montana because the vitality of the Game Farm industry was premised upon the profits derived from fee-shooting. The ban on the transfer of licenses was significant because it essentially prohibited Game Farm owners from selling those Game Farms to others, since a Game Farm could not operate without a valid license. I-143 did not, however, eliminate all uses of alternative livestock as it still permitted Game Farm operators to own herds, harvest the animals for their meat or antlers, or sell them in out-of-state markets where fee-shooting was legal. *Kafka,* ¶¶ 7-8.

¶ 5 The enactment and enforcement of I-143 led to several lawsuits in both state and federal court in Montana. At the time of this suit, the Buhmanns resided in Blaine County, Montana, and owned and operated the Circle Eagle Game Farm, a twenty-nine

acre game farm which was regulated by FWP. The Buhmanns began the Circle Eagle Ranch in 1997 after applying for and receiving a loan from the state of Montana's Department of Commerce. The Buhmanns' loan application included a business plan describing an elk-breeding program they planned to institute. This plan included the annual selling of wholesale mature bulls to shooting operations, and the selling of retail mature cows to other breeding operations. The Buhmanns and the Circle Eagle Ranch received an alternative livestock license through FWP which allowed them to keep sixty elk. They began selling elk in 1999. In addition to selling elk, the Buhmanns also sold a mineral supplement for captive deer and elk called Sweet Pro.

¶ 6 The Wallaces started the Big Velvet Ranch in Ravalli County, Montana, after obtaining a Game Farm license in 1992. The Big Velvet Ranch eventually encompassed roughly 2000 acres. In the course of developing their ranch, the Wallaces purchased material for fencing and other infrastructure, constructed a lodge on the property, removed the native deer and elk, and then imported alternative livestock (elk) from other locations. The Wallaces raised captive elk, and provided opportunities for the fee-shooting of elk on the Big Velvet Ranch. Under this service, clients would come and stay on the Big Velvet Ranch and be guaranteed to shoot an elk within the confines of the ranch. Additionally, the Wallaces bred captive elk for other Game Farms.

¶ 7 According to the factual assertions in their complaint, the Wallaces invested millions of dollars in developing the Big Velvet Ranch, and took a number of measures to ensure that their alternative livestock was of the highest quality and was disease-free. In 1999, after a three-year testing process, the Big Velvet Ranch was certified as tuberculosis-free, and in 2001 certified as brucellosis-free. Additionally, the Wallaces tested roughly 700 animals from the Big Velvet Ranch for CWD, and all those tests came back negative. The Wallaces also claim they developed prototype feed trucks, and appropriate facility modifications which would allow them to maintain a high nutritional level of the elk, at a cost of over $600,000. The Wallaces further stated that they took other measures, including the hiring of a veterinarian and the development of extensive monitoring systems, to ensure that their operation established a reputation as one of the most successful private elk ranches in the United States.

¶ 8 From 1997 through 1999, the Wallaces claim to have harvested over 100 mature bulls and earned gross revenues of over $1 million per year. The Wallaces allege that their ranch guests would pay on average $7,000 for hunting mature bull elk, and that this comprised the majority of the ranch's revenues. Between 1995 and 2000, the Wallaces hosted more than 600 clients.

¶ 9 After the passage of I-143, and its interpretation by the Attorney General's office and FWP, the Wallaces claim that their existing and prospective

customers cancelled their plans to visit the Big Velvet Ranch, and that many demanded refunds on their deposits. Similarly, there was a cancellation of promised purchases of animals and feed from the Circle Eagle Ranch. The Wallaces claim that in order to stem the financial hemorrhaging at the ranch, they contacted various Indian tribes in Montana to assess their interest in receiving approximately 500 animals from the Big Velvet Ranch. After obtaining the appropriate permits, the Wallaces thereafter entered into an agreement with the Crow Indian Tribe to transfer some of their animals. After the first shipment of 67 elk, the Wallaces were enjoined in the First Judicial District Court from transferring any more of their alternative livestock to the Crow Indian Reservation to be released in an unfenced area. The Wallaces appealed the issuance of this injunction to this Court, and it was upheld in *Hagener v. Wallace*, 2002 MT 109, 309 Mont. 473, 47 P.3d 847. The Wallaces also sought injunctions against the enforcement of I-143 in Ravalli County District Court, as well as separately in the federal district of Montana, both of which were denied. Moreover, Len Wallace was tried and convicted in Justice Court for violating I-143's ban on fee-shooting.

¶ 10 On June 6, 2002, the Wallaces and Buhmanns filed a joint action against the state of Montana, Attorney General Mike McGrath, and FWP Director Jeff Hagener in the Seventeenth Judicial District Court, Blaine County, seeking damages for the taking of their private property under the Fifth

Amendment and Article II, Section 29 of the Montana Constitution. The Wallaces and Buhmanns alleged that I-143 violated the Fifth Amendment's prohibition on the taking of private property without just compensation, as well as Article II, Section 29's prohibition on a damaging of their property. The Wallaces and Buhmanns alleged that I-143 affected a taking of their private property rights without just compensation "by specifically taking the only viable source of profitability (i.e., shooting animals for a fee), and thereby destroying the Montana breed stock sale market, and prohibiting the transfer of licenses." The Wallaces and Buhmanns alleged that the State enforced I-143 to the detriment of their property rights and that this enforcement imposed new retroactive liabilities on them, damaging their vested property rights as well. Additionally, the Wallaces and Buhmanns alleged that by prohibiting the transfer of their licenses and the value of their investments in their Game Farms to others, the State took not only their "property rights and licenses, but also the profitable use of the land, and the increased value of the land as a result of the prior issued licenses." The Buhmanns and Wallaces also alleged that McGrath and Hagener violated their constitutional rights by enforcing I-143 against them, and brought a claim for relief under 42 U.S.C. § 1983.[1]

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[1] At the close of appellants' case-in-chief, the District Court granted the State's motion to dismiss the § 1983 claim for failure

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¶ 11 The precise nature of the Buhmanns' and Wallaces' claims differed slightly. Because the Buhmanns did not provide fee-shooting services, their business operations were not directly affected by I-143. However, by eliminating the in-state market for fee-shooting, I-143 had a significant economic impact on the profitability of their breeder operation and their marketing of Sweet Pro. The Wallaces, on the other hand, were directly affected since the Big Velvet Ranch provided fee-shooting services.

¶ 12 On July 22, 2002, the State filed a motion to change the venue of the case from Blaine County to the First Judicial District, Lewis and Clark County, pursuant to § 25-2-116, MCA. On August 16, 2002, the Wallaces and Buhmanns filed a motion to sever the parties, pursuant to M.R. Civ. P. 21. In the motion, the Buhmanns argued that their action should remain in Blaine County, while the Wallaces argued that they should be able to pursue their cause of action in Ravalli County under a complaint they filed there on August 6, 2002. On August 28, 2002, the Blaine County District Court denied the motion to sever and granted the State's motion to change the venue of the case to Lewis and Clark County.

¶ 13 On September 17, 2002, the First Judicial District Court, Judge Dorothy McCarter presiding, assumed jurisdiction over the appellants' suit. On

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to proof. Appellants did not object at the time, and do not challenge the dismissal of this claim on appeal.

October 10, 2002, the District Court granted a motion filed by appellees Sportsmen for I-143 and Montana Wildlife Federation to intervene in this matter. Initially, the District Court set a jury trial to hear appellants' claims. However, the State subsequently filed a motion to bifurcate the proceedings, arguing that the issue of whether the State was liable for a taking should be decided solely by the District Court. If the State was found liable, then the issue of damages would be submitted to a jury. The appellants resisted the State's motion, asserting that they were entitled to a jury trial on the issue of takings liability.

¶ 14 The State also filed a motion seeking summary judgment on appellants' takings claims. One aspect of the State's motion dealt with the issue of whether appellants could assert a categorical takings claim with respect to their personal property (e.g., alternative livestock, and Game Farm equipment). The State argued that under the authority of *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), a categorical taking claim may be asserted only for claims regarding a taking of land, and not for a taking of personal property or other property interests. *See Kafka,* ¶¶ 67-69 (noting the distinction between categorical and regulatory takings claims). Since the appellants' land all retained significant value in spite of the passage of I-143, a categorical taking claim would fail in this case. Additionally, the State argued that it was further entitled to summary judgment on appellants' regulatory takings claims.

¶ 15 After holding a hearing on these motions on October 6, 2004, the District Court granted a portion of the State's motion, concluding that the question of whether there had been a taking presented a question of law to be determined by the District Court without a jury. If a taking was found by the District Court, it would submit the issue of damages to a jury. Additionally, while the District Court ultimately denied the State's summary judgment motion and concluded that it would hold a bench trial on appellants' takings claims, it agreed with the State that under *Lucas,* personal property could not form the basis for a categorical takings claim. Moreover, the District Court agreed with a legal argument raised in the State's brief that the same analysis, based on federal law, applied to takings claim, whether brought under Article II, Section 29 of the Montana Constitution or the Fifth Amendment to the U.S. Constitution.

¶ 16 Beginning on November 30, 2004, the District Court held a three-day bench trial on appellants' takings claims. The District Court heard testimony from Bruce Buhmann, Len Wallace, Dr. Peter Nickerson (Dr. Nickerson), an economist and expert witness for appellants, as well as other witnesses for both parties. The District Court also received a number of exhibits into evidence. Based on this evidence and testimony, the District Court made a number of factual findings with respect to the

Wallaces' and Buhmanns' operations and property interests.[2]

¶ 17 With respect to the Wallaces, the District Court found that they had complied with the licensing requirements set forth by FWP in the operation of the Big Velvet Ranch. The District Court noted that as the Wallaces sought to expand their operation over the years, they had applied with FWP for the necessary expansion permits. In 1997, the Wallaces were denied an expansion request by FWP which would have added approximately 1000 acres to the then-existing roughly 2000 acre ranch. After this denial, the Wallaces decided to sell their property out of a concern that they would not have enough grazing land for their elk. They subsequently acquired a Game Farm in Wisconsin to provide grazing land for their animals, but were prevented from shipping the

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[2] In this connection, we note that much of the analysis by the District Court and argument by the parties during the bench trial, focused on the purposes and objectives of I-143, and whether it accomplished the goals of preventing outbreaks of CWD, preserving Montana's "fair chase" hunting heritage, and preventing the privatization or commercialization of wildlife. However, as we observed in *Kafka*, recent United States Supreme Court jurisprudence has foreclosed an inquiry into the efficacy or purposes of a regulatory change (which are best considered as "due process" concerns) in the realm of regulatory or categorical takings analysis. *See Kafka*, ¶¶ 70-71 (discussing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005)). In other words, for purposes of the takings analysis in this case, it is immaterial whether or not I-143 is effective in achieving any of the objectives or concerns it was designed to address.

animals back and forth due to outbreaks of CWD on Game Farms in several states, including Montana. Additionally, the District Court found that prior to I-143, the Wallaces had difficulty marketing their elk outside of Montana because of a moratorium on interstate elk shipments from Montana as a result of a CWD outbreak on a Montana Game Farm in 1997. The District Court further found that an outbreak of CWD on another Game Farm impacted the ability of the Wallaces to sell their property and that it was still on the market at the time I-143 went into effect.

¶ 18 The District Court found that after the passage of I-143, the Wallaces began selling off their elk and Game Farm equipment at a "substantial loss" compared with their pre-I-143 value. Between 1997 and 1999, the Wallaces spent approximately $666,166 to purchase elk. Len Wallace testified that the value of his elk herd prior to I-143 was roughly $5.5 million. After I-143, he liquidated the herd for approximately $238,000, and in some cases simply donated his elk to various organizations. Additionally, the Wallaces sold some of their specialized equipment, which cost approximately $600,000 to purchase, for $150,000. The District Court found that the net income from the Big Velvet Ranch for the four-year period prior to I-143 was $1,480,452. Financial records prepared by Dr. Nickerson demonstrated that the Wallaces had a basis of $4,595,123 in their business. Between 1994 and 2003, the records indicated numerous sales of parcels of land ranging between ten and forty acres, totaling more than $1 million dollars, as well as two

sales of property to another ranch for more than $5 million dollars.

¶ 19 In total, the District Court concluded that the Wallaces suffered a significant, but not complete, loss of value to their Game Farm business as a result of I-143. The District Court quantified this loss as a fifty percent reduction in the value of their business. This figure apparently took into account the fact that while the Wallaces' elk suffered a significant devaluation, the real estate associated with the Big Velvet Ranch had in fact appreciated. The District Court further found that while the market for alternative livestock elk had declined, alternative livestock could still be bred and sold to Game Farms in other states.

¶ 20 With respect to the Buhmanns, the District Court found that when they initially purchased the land on which the Circle Eagle Game Farm is located in the mid-1980's, they had no intention of operating a Game Farm but chose that course much later. The District Court found that the Buhmanns purchased all of their elk in 1997 for $29,500, and began selling them in 1999. Their total sales receipts through 2000 were $8,948, and they received $11,963 from elk sales in 2001 and 2002. They anticipated selling approximately 10 calves a year for about $30,000. With respect to their sales of Sweet Pro, the District Court found they had gross sales for this product of approximately $68,000 between 2000 and 2002. For the overall period of their business from 1997 to 2002, they had a net business loss of $41,325. With respect

to the impact on their business from I-143, the District Court found that no aspect of that business was prohibited because they did not operate a fee-shooting operation. However, I-143 did affect the market for both their alternative livestock and Sweet Pro. The District Court concluded that the Buhmanns suffered a net loss of $22,000 as a result of I-143.

¶ 21 In its conclusions of law, the District Court began by restating its determination that the same legal analysis, based upon federal law, applied to claims whether brought under the Fifth Amendment or Article II, Section 29. Moreover, the District Court stated that a categorical takings claim did not lie in this case under *Lucas* because categorical takings apply only to takings of land. The District Court then went on to reject appellants' claims for a regulatory taking under the analytical framework set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *See Kafka,* ¶¶ 67-73 (discussing *Penn Central* regulatory takings analysis). The reasoning and analysis of the District Court will be discussed in greater detail below.

¶ 22 The Wallaces and Buhmanns now appeal the denial of their takings claims by the District Court. They present the following issues on appeal:

> ¶ 23 **Issue One:** *Did the District Court err in changing the venue of the proceedings to Lewis and Clark County and denying appellants' motion to sever the Wallaces' claims?*

¶ 24 **Issue Two:** *Did the District Court err in concluding that liability for appellants' takings claims would be decided by the court instead of a jury?*

¶ 25 **Issue Three:** *Did the District Court err in concluding that Article II, Section 29 of the Montana Constitution does not provide any greater constitutional protection against the taking of private property than the Fifth Amendment to the U.S. Constitution, and that the same legal analysis applies to takings claims brought under the Fifth Amendment to the U.S. Constitution and Article II, Section 29 of the Montana Constitution?*

¶ 26 **Issue Four:** *Did the District Court err in denying appellants' claim that I-143 affected a categorical taking of their personal property?*

¶ 27 **Issue Five:** *Did the District Court err in concluding that I-143 did not affect a regulatory taking of appellants' private property?*

STANDARD OF REVIEW

¶ 28 We review a district court's findings of fact under the clearly erroneous standard, and its conclusions of law for correctness. *Roe Family, L.L.C. v. Lincoln Co. Bd. of Commrs.*, 2008 MT 70, ¶ 12, 342 Mont. 108, ¶ 12, 179 P.3d 514, ¶ 12. A finding of fact is clearly erroneous if it is not supported by

substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been committed. *Roe Family,* ¶ 12.

DISCUSSION

¶ 29 **Issue One:** *Did the District Court err in changing the venue of the proceedings to Lewis and Clark County and denying appellants' motion to sever the Wallaces' claims?*

¶ 30 The Seventeenth Judicial District Court, Blaine County, granted the State's motion to transfer the case to Lewis and Clark County where the merits of appellants' takings claims were ultimately decided. The appellants argue that the District Court erred in granting the change of venue. In its order, the Blaine County District Court found that a change of venue was proper under § 25-2-116, MCA, which reads as follows:

> **25-2-116. Multiple claims.** In an action involving two or more claims for which this part designates more than one as a proper place of trial, a party entitled to a change of place of trial on any claim is entitled to a change of place of trial on the entire action, subject to the power of the court to separate claims or issues for trial under Rule 42(b) of the Montana Rules of Civil Procedure.

¶ 31 Although the Wallaces' and Buhmanns' complaint asserted only two counts, the District

Court determined that they asserted more than two claims for purposes of the statute because the specific allegations and relief sought by the Buhmanns was sufficiently distinct from the specific allegations and relief sought by the Wallaces. The District Court observed that it is the nature of the rights asserted and demand for relief sought that determines the number of claims, rather than a formal designation in the complaint itself. The District Court noted that the Wallaces and Buhmanns each detailed different locations and businesses which were differently affected by I-143, and that the damages in each case differed based not only on these different locations but also on the duration of the effect, the type of the business, and the extent of the respective parties' investments.

¶ 32 The District Court also noted that because their claims were brought against the state of Montana, the proper venue for the claims, pursuant to § 25-2-126, MCA, would be either the county of the plaintiffs' respective residences or Lewis and Clark County. That statute reads in pertinent part as follows:

> The proper place of trial for an action against the state is in the county in which the claim arose or in Lewis and Clark County. In an action brought by a resident of the state, the county of the plaintiff's residence is also a proper place of trial.

Section 25-2-126(1), MCA.

¶ 33 Here, the parties resided in different counties. The Buhmanns resided in Blaine County, while the Wallaces resided in Ravalli County. Therefore, while Blaine County would be a proper venue under the statute for the Buhmanns, it would not be proper for the Wallaces. Thus, under § 25-2-126(1), MCA, Lewis and Clark County would be the only appropriate venue for all parties. Since the State was entitled to a change of venue under § 25-2-116, MCA, by virtue of the presence of multiple claims, the Blaine County District Court concluded that a change of venue to Lewis and Clark County was appropriate.

¶ 34 Additionally, the District Court denied a motion filed by the appellants to keep the Buhmanns' claims in Blaine County, and allow the Wallaces to sever their claims and pursue a newly-filed complaint in Ravalli County. On the one hand, the District Court concluded that the Buhmanns had failed to show good cause under M.R. Civ. P. 42(b), to separate the claims, and further failed to demonstrate how their access to court in Lewis and Clark County would be impractical or expensive. With respect to the Wallaces' motion to sever, the District Court denied that motion under the authority of *Emery v. Federated Foods, Inc.*, 262 Mont. 83, 863 P.2d 426 (1993), for the simple reason that the motion to sever had yet not been filed at the time the State filed its motion for change of venue.

¶ 35 On appeal, the Wallaces and Buhmanns maintain the District Court erred in its application and interpretation of these statutes, and assert that

they simply do not cover scenarios involving multiple plaintiffs. They maintain that the District Court's interpretation unfairly deprives them of their right to change venue. They argue that the intent of these statutes is to prevent plaintiffs from adding spurious claims to prevent defendants from obtaining a favorable venue, a concern not present in this case.

¶ 36 With respect to the denial of the motion to sever, the appellants argue that the District Court's decision not to consider the motion due to its timing directly contravenes the holdings in both *DML, Inc. v. Fulbright,* 2005 MT 204, 328 Mont. 212, 119 P.3d 93, and *Emery.* Appellants argue that the doctrine that propriety of venue is determined as of time of the complaint, applies only in situations where the composition of the parties changes, and was not intended to freeze in time all activities occurring in a case – including the motion to sever which was filed here. Accordingly, they argue that the motion to sever should have been considered and granted by the District Court.

¶ 37 The State maintains that *DML* controls and demonstrates that the District Court correctly permitted a change of venue to Lewis and Clark County. With respect to the motion to sever, the State points out that the decision of whether to sever claims lies within the District Court's discretion under § 25-2-116, MCA, and M.R. Civ. P. 42(b), in furtherance of convenience and to avoid prejudice. Here, the District Court explicitly found that the appellants failed to make a showing justifying the

invocation of M.R. Civ. P. 42(b). The State asserts that appellants have not challenged this finding on appeal.

¶ 38 "The determination of whether a county is the proper place for trial is a question of law involving the application of the venue statutes to pleaded facts." *DML*, ¶ 7. Our review of such decisions is plenary, meaning we determine whether the district court's ruling was legally correct. *DML*, ¶ 7. We conclude that the Blaine County District Court did not err in permitting the State to change the venue of appellants' cause of action to Lewis and Clark County.

¶ 39 In *DML*, this Court interpreted § 25-2-116, MCA, as follows:

> By the words of § 25-2-116, MCA, "a party entitled to a change of place of trial on any claim is entitled to a change of place of trial on the entire action." This statute contemplates a multiple claim situation in which the county where the plaintiff files is proper for one claim but not for one or more of the others. As recognized by the Evidence Commission Comments to § 25-2-116, MCA, this Court has ruled consistently that a defendant entitled to a change of venue on one claim should have it on the entire action.

DML, ¶ 16.

¶ 40 Here, it is patent that venue in Lewis and Clark is proper with respect to the Buhmanns' claims by virtue of § 25-2-126(1), MCA. Because the Wallaces

reside in Ravalli County, venue is appropriate there, or in Lewis and Clark County. Under *DML,* therefore, the State is entitled to a change of venue with respect to the entire action. *See DML,* ¶ 27 (Gray, C.J., concurring) (concluding that change of venue is appropriate under § 25-2-116, MCA, when action consists of multiple claims, venue statutes designate more than one county for one or more claims, and action is brought in a county which is proper for one, but not all, of those claims). Since Lewis and Clark County is an appropriate venue for all parties in this case, the District Court did not err in allowing the change of venue.

¶ 41 With respect to the Blaine County District Court's refusal to consider the motion to sever, we agree with the State that the District Court acted within its discretion in denying such motion. Decisions as to trial administration matters, such as a motion to bifurcate or sever, are within the "broad discretion" of the district court. *Jarvenpaa v. Glacier Elec. Cooperative, Inc.,* 1998 MT 306, ¶ 12, 292 Mont. 118, ¶ 12, 970 P.2d 84, ¶ 12. In this case, regardless of whether the District Court could or should have considered the merits of the motion to sever, it stated clearly in its order that appellants had failed to demonstrate good cause to sever, as required under M.R. Civ. P. 42(b). Appellants do not challenge this finding. Thus, we affirm the Blaine County District Court's decisions as to venue and severance.

¶ 42 **Issue Two:** *Did the District Court err in concluding that liability for appellants' takings claims would be decided by the court instead of a jury?*

¶ 43 In its October 22, 2004 Decision and Order, the Lewis and Clark County District Court granted a motion filed by the State to bifurcate the liability and damages phases of these proceedings, allowing the former to be determined solely by the District Court, while the latter would be heard by a jury if the District Court determined the State was liable for an uncompensated taking. The District Court concluded that the question of whether there was a taking is a question of law, and that a property owner's right to a jury trial was limited to the issue of damages.

¶ 44 The District Court determined that its position was consistent with *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) – a case relied upon by appellants for their argument that they were entitled to a jury trial on the issue of takings liability. The District Court considered whether the issues of damages and liability were intertwined, or were distinct and should be presented separately, and concluded there was no practical reason to subject jurors to evidence unrelated to the issue of damages. Additionally, the District Court determined that it needed adequate time to consider liability before proceeding with a trial on damages – an exercise that would be moot if liability was decided in favor of the State.

¶ 45 Appellants maintain that the District Court erred and wrongfully denied them their right to a jury trial on the issue of takings liability. Citing to *Howard v. State,* 198 Mont. 470, 647 P.2d 828 (1982) and *Butte Country Club v. Metro. Sanitary and Storm Sewer Dist. No. 1,* 164 Mont. 74, 519 P.2d 408 (1974), appellants maintain that individuals asserting inverse condemnation claims have historically been entitled to jury trials. Citing to *Matter of C.L.A.,* 211 Mont. 393, 685 P.2d 931 (1984), they further argue that under Article II, Section 26 of Montana Constitution, their fundamental right to a trial by jury is guaranteed as to all class of cases in which the right was enjoyed when the Montana Constitution was adopted in 1889. Appellants argue that this class of cases extends beyond those common-law actions recognized in 1889, and includes modern-day actions that involve rights and remedies of the sort traditionally enforced in an "action at law," such as the takings claims they presented here.

¶ 46 Under the authority of *Del Monte Dunes,* appellants argue that their suit for an uncompensated taking of their property is an action at law, and that the reasoning in *Del Monte Dunes* is supported by Montana cases, including *Solberg v. Sunburst Oil & Gas Co.,* 70 Mont. 177, 225 P. 612 (1924) and *Chessman v. Hale,* 31 Mont. 577, 79 P. 254 (1905). *See Del Monte Dunes,* 526 U.S. at 709-10, 119 S.Ct. at 1638 (action sounding in tort and seeking legal relief is an action at law); *see also Little v. Little,* 127 Mont. 152, 155-56, 259 P.2d 343, 344 (1953)

(actions at law include actions to recover specific personal property with damages). Appellants maintain that the *Lucas* and *Penn Central* tests for analyzing takings claims are factual inquiries which are properly allocated to a jury. They therefore argue that the District Court erred in concluding that the determination as to whether a taking has occurred is a question of law, and maintain instead that it is a question of fact.

¶ 47 The State maintains that because there is no established tradition of trials by jury in regulatory takings cases in Montana, this Court decides this issue on a "clean slate." The State then asserts that appellants' reliance on *Del Monte Dunes* is misplaced because that case involved solely the question of whether a plaintiff was entitled to a jury trial under the Seventh Amendment to the United States Constitution for an action brought under 42 U.S.C. § 1983. The State maintains that *Del Monte Dunes* did not address the question of whether plaintiffs are generally entitled to a jury trial on the issue of liability in takings cases. The State notes that other jurisdictions, such as California, have generally held that the issue of liability in a takings claim is a question of law for the court, with a right to a jury trial available on the issue of damages. Accordingly, the State urges affirmance of the District Court on the grounds that the question of whether a taking has occurred is primarily a legal question to which no right to jury trial exists.

¶ 48 Whether an individual is entitled to a jury trial presents a question of law which we review de novo for correctness. *Supola v. Mont. Dept. of Justice, Drivers License Bureau,* 278 Mont. 421, 423, 925 P.2d 480, 481 (1996). As an initial matter, we agree with the State that the question before the Court is one of first impression in the state of Montana. Appellants are correct in observing that in both *Howard* and *Butte Country Club,* the trial courts apparently afforded claimants jury trials in inverse condemnation cases. *See Howard,* 198 Mont. at 472, 647 P.2d at 829; *Butte Country Club,* 164 Mont. at 76, 519 P.2d at 409. However, neither case provides any analysis or discussion which would bear on the issue of whether appellants' categorical and regulatory takings claims should be submitted to a jury, and neither case has ever been cited as authority on this point of law.

¶ 49 We therefore turn to *Del Monte Dunes,* upon which the State and the appellants rely for their opposite positions. In that case, a property owner (Del Monte Dunes) brought an action against the city of Monterey under 42 U.S.C. § 1983 based on its repeated denial of Del Monte Dunes' request for a development permit. Each time Del Monte Dunes submitted a development request, the city of Monterey denied it and imposed more rigorous demands on Del Monte Dunes. *Del Monte Dunes,* 526 U.S. at 694, 119 S.Ct. at 1631. Eventually, Del Monte Dunes appealed these denials to the city council, and was again denied. Del Monte Dunes consequently

filed a suit in federal district court alleging, among other things, that the denial amounted to an uncompensated taking under the Fifth Amendment. *Del Monte Dunes,* 526 U.S. at 698, 119 S.Ct. at 1633. The takings claims in that case were ultimately submitted to a jury, which returned a verdict in favor of Del Monte Dunes. *Del Monte Dunes,* 526 U.S. at 701, 119 S.Ct. at 1634. The question of whether the takings claim was properly submitted to the jury was later affirmed by the Ninth Circuit. The Ninth Circuit's decision was subsequently appealed to the United States Supreme Court.

¶ 50 One of the issues considered by the *Del Monte Dunes* court was whether it was proper for the district court to submit the question of liability for takings to the jury, instead of having the issue decided by the district court without the aid of a jury. *Del Monte Dunes,* 526 U.S. at 707, 119 S.Ct. at 1637. Del Monte Dunes asserted that its right to a jury trial was conferred by the Seventh Amendment and 42 U.S.C. § 1983, and the United States Supreme Court agreed. *Del Monte Dunes,* 526 U.S. at 710-12, 119 S.Ct. at 1638-40. In its reasoning, the *Del Monte Dunes* court explained that because an action under § 1983 sounds primarily in tort, it was of a type of action cognizable under the common law, and thus a cause of action for which the Seventh Amendment provides a trial by jury. *Del Monte Dunes,* 526 U.S. at 709-10, 119 S.Ct. at 1638.

¶ 51 In reaching this conclusion, the United States Supreme Court explicitly rebuffed an argument advanced by the city of Monterey that there was no common law right to a jury in eminent domain proceedings. In doing so, the Supreme Court highlighted the fact that the tortious nature of a § 1983 claim was wholly independent from the nature of underlying right giving rise to the § 1983 claim itself.

> As Justice SCALIA notes ... we have declined in other contexts to classify § 1983 actions based on the nature of the underlying right asserted, and the city provides no persuasive justification for adopting a different rule for Seventh Amendment purposes. Even when analyzed not as a § 1983 action *simpliciter,* however, but as a § 1983 action seeking redress for an uncompensated taking, Del Monte Dunes' suit remains an action at law.
>
> Although condemnation proceedings spring from the same Fifth Amendment right to compensation which, as incorporated by the Fourteenth Amendment, is applicable here, a condemnation action differs in important respects from a § 1983 action to redress an uncompensated taking.

Del Monte Dunes, 526 U.S. at 711-12, 119 S.Ct. at 1639 (citations omitted).

¶ 52 The Supreme Court explained this point further as follows:

> Condemnation proceedings differ from the instant cause of action in another fundamental respect as well. When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution. If the condemnation proceedings do not, in fact, deny the landowner just compensation, the government's actions are neither unconstitutional nor unlawful. Even when the government takes property without initiating condemnation proceedings, there is no constitutional violation unless or until the state fails to provide an adequate post deprivation remedy for the property loss. In this case, however, Del Monte Dunes was denied not only its property but also just compensation or even an adequate forum for seeking it. That is the gravamen of the § 1983 claim.

Del Monte Dunes, 526 U.S. at 714-15, 119 S.Ct. at 1641 (quotations and citations omitted).

¶ 53 In conclusion, the Supreme Court then clarified the scope of its holding with the following admonition:

> We note the limitations of our Seventh Amendment holding. **We do not address the jury's role in an ordinary inverse condemnation suit.** The action here was brought under § 1983, a context in which the jury's role in vindicating constitutional rights has long been recognized by the federal courts. A federal court, moreover,

> cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post deprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one. Our decision is also circumscribed in its conceptual reach. The posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim; although the city objected to submitting issues of liability to the jury at all, it approved the instructions that were submitted to the jury and therefore has no basis to challenge them.

Del Monte Dunes, 526 U.S. at 721-22, 119 S.Ct. at 1644 (emphasis added).

¶ 54 The *Del Monte Dunes* Court thus took great pains to expressly limit its holding to actions brought under § 1983, and deliberately chose not to address the province of the jury in an ordinary inverse condemnation suit, or, by extension, a regulatory or categorical takings claim such as presented here.

¶ 55 In this connection, we also find that *Chessman, Matter of C.L.A.*, and *Sunburst Oil & Gas,* upon which appellants rely, are not particularly helpful in deciding the issue presently before the Court. Those cases simply establish that a right to a jury trial exists for the class of cases which existed at the time the Montana Constitution was adopted.

Chessman, 31 Mont. at 584-88, 79 P. at 256-57. "The rule in Montana is that our state constitution only guarantees the right to a jury trial in the class of cases in which the right was enjoyed when the constitution was adopted." *Matter of C.L.A.,* 211 Mont. at 396, 685 P.2d at 933. However, none of these cases demonstrate that Montanans enjoyed a right to jury trial on the issue of liability in an inverse condemnation, or categorical or regulatory takings case.

¶ 56 In this case, the District Court concluded that appellants would be entitled to a jury trial on the issue of damages if liability for the takings claim was established. The weight of authority tends to support the view that the right to jury trial in inverse condemnation suits – and, by extension, regulatory or categorical takings claims – is limited solely to the issue of damages. *Hensler v. City of Glendale,* 8 Cal.4th 1, 32 Cal.Rptr.2d 244, 876 P.2d 1043, 1052 (1994); *Tibbs v. City of Sandpoint,* 100 Idaho 667, 603 P.2d 1001, 1004 (1979); *Dept. of Agriculture and Consumer Servs. v. Mid-Florida Growers, Inc.,* 521 So.2d 101, 104 (Fla.1988); *Deisher v. Kan. Dept. of Transp.,* 264 Kan. 762, 958 P.2d 656, 663 (1998); *Cumberland Farms, Inc. v. Town of Groton,* 262 Conn. 45, 808 A.2d 1107, 1126-27 (2002); *Galvis v. State, Dept. of Transp.,* 140 Wash.App. 693, 167 P.3d 584, 589 (Div. 2 2007); *See also New Port Largo, Inc. v. Monroe Co.,* 95 F.3d 1084, 1092 (11th Cir.1996) (concluding specifically that there is no jury requirement for deciding whether a regulatory takings has

occurred). Under these authorities, the District Court presumptively satisfied appellants' constitutional right to a jury trial by providing a jury trial on the issue of damages.

¶ 57 Against this weight of authority, appellants have not cited a single case in which a court has held that the issue of liability in a categorical or regulatory takings case must be submitted to a jury. Although the question of whether a taking has occurred is in the nature of an "ad hoc, factual inquiry," *see Kafka,* ¶ 69, it appears that both state and federal courts are in near universal agreement that whether the facts show that a regulatory or categorical taking has occurred is ultimately a question of law for the court. *E.g., Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 932-33 (Tex.1998); *Chancellor Manor v. United States,* 331 F.3d 891, 898 (Fed.Cir.2003); *Alevizos v. Metro. Airports Commn. of Minneapolis and St. Paul,* 298 Minn. 471, 216 N.W.2d 651, 660-61 (1974); *Seiber v. State By and Through the Bd. of Forestry,* 210 Or.App. 215, 149 P.3d 1243, 1246 (2006); *Vulcan Materials Co. v. City of Tehuacana,* 369 F.3d 882, 886-87 (5th Cir.2004); *but see, Noghrey v. Town of Brookhaven,* 48 A.D.3d 529, 852 N.Y.S.2d 220, 221 (2 Dept.2008) (submitting the question of whether a regulatory taking has occurred for a jury's determination). In fact, the authority in this area strongly supports the District Court's determination that "[w]hether a compensable taking has occurred is a question of law based on factual underpinnings." *Am. Pelagic Fishing Co., L.P. v.*

United States, 379 F.3d 1363, 1371 (Fed.Cir.2004) (citing *Maritrans, Inc. v. United States,* 342 F.3d 1344, 1350-51 (Fed.Cir.2003)); *Moldon v. Co. of Clark,* 188 P.3d 76, 79 (Nev.2008); *State v. Dunn,* 888 N.E.2d 858, 861 (Ind.App.2008); *Scott v. Co. of Custer,* 178 P.3d 1240, 1243 (Colo.App.2007).

¶ 58 Under § 26-1-201, MCA, "all questions of law" are to be decided by the court, while questions of fact go to the jury pursuant to § 26-1-202, MCA. While takings claims arguably present "mixed questions of fact and law," *see Del Monte Dunes,* 526 U.S. at 721, 119 S.Ct. at 1644, and while it may be that some cases in the regulatory or categorical takings arena present questions of fact which should be submitted to a jury, the appellants here have not articulated what specific factual questions needed to be resolved by a jury in this case. In fact, it appears from the record that there were no factual disputes concerning the effects of I-143 on appellants' businesses and private property. Instead, the dispute centered on whether, as a legal matter, I-143 constituted a regulatory or categorical taking.

¶ 59 In sum, we decline at this time to adopt a bright-line rule regarding the role of a jury in the context of categorical or regulatory takings claims. However, we conclude that the District Court did not err in this case by reserving for itself the question of whether the State was liable for an uncompensated taking. Given the primarily legal nature of takings inquiries, a jury determination should be required only in those cases in which the resolution of a factual

dispute is necessary in order to determine whether a taking has occurred. Here, there appears to have been no such dispute. The appellants have not pointed to any factual question which should have been decided by a jury, nor for that matter do they complain that any of the District Court's factual findings were in error. Instead, the gravamen of the appellants' challenge is that the District Court made an incorrect legal determination that a regulatory or categorical taking had occurred. Under these particular circumstances, therefore, we hold that the District Court did not err in deciding the takings question without the presence of a jury.

¶ 60 **Issue Three:** *Did the District Court err in concluding that Article II, Section 29 of the Montana Constitution does not provide any greater constitutional protection against the taking of private property than the Fifth Amendment to the U.S. Constitution, and that the same legal analysis applies to takings claims brought under the Fifth Amendment to the U.S. Constitution and Article II, Section 29 of the Montana Constitution?*

¶ 61 In its Decision and Order of October 22, 2004, the District Court, citing to *Western Energy Co. v. Genie Land Co.*, 227 Mont. 74, 737 P.2d 478 (1987), concluded that the same legal analysis, based on federal law under *Penn Central*, applies to takings claims whether brought under the U.S. or Montana Constitution. Appellants argue that the District Court erred in reaching this conclusion, and assert that Article II, Section 29 of the Montana

Constitution provides greater protection than the Fifth Amendment, thus requiring a different analysis. This provision reads as follows:

> **Eminent domain.** Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

Mont. Const., Art. II, § 29.

¶ 62 Appellants assert that the constitutional protection against "taking and damaging" of property is a fundamental right because it occurs in Article II of the Montana Constitution and, therefore, the State must show a compelling interest that is narrowly-tailored to impose the least restraints possible on their property interests. Appellants maintain that the State has failed to meet this burden because it failed to demonstrate that I-143 substantially advanced any purported legitimate state interests such as protecting the tradition of fair chase hunting in Montana, or preventing the spread of CWD. *See* Opinion, ¶ 16 n. 2. Appellants assert that their position is supported by the plain language of Article II, Section 29, which protects against a "taking" or "damaging." Therefore, the inquiry is whether Article II, Section 29 of the Montana Constitution affords greater, more expansive rights than does the Fifth

Amendment to the U.S. Constitution, to the extent that a wholly separate regulatory takings analysis need be performed under the Montana Constitution.

¶ 63 As we noted in *Kafka,* we have generally looked to federal case law for guidance when considering takings claims brought under Article II, Section 29 – a practice that is consistent with that of other states with similar or identical language in their state constitutions. *See Kafka,* ¶ 30. Appellants and the Dissent have seized upon the "damaging" language in Article II, Section 29 to argue for a sweeping new interpretation of this provision.

¶ 64 It is important to bear in mind that Article II, Section 29 protects against a "taking" and "damaging" of private property. We take this occasion to reaffirm the position taken in *Kafka,* that the protection against a "taking" of private property under Article II, Section 29 is coextensive with the protection given under the Fifth Amendment. *Kafka,* ¶¶ 30-31. In other words, a takings analysis based on federal law under *Penn Central* or *Lucas* is to be applied to takings claims whether brought under the U.S. or Montana Constitutions. This practice is in accord with the overwhelming majority of states that have similar or identical language in their state constitutions.

¶ 65 The question then becomes what type of protection, and accompanying analysis, is provided against a "damaging" of private property. This "or damaged" language was adopted verbatim from the

1889 Montana Constitution, and already has a well-established meaning. In *Less v. City of Butte,* 28 Mont. 27, 72 P. 140 (1903), the plaintiff sued the city for damages to his property occasioned by a change in the grade and excavation of the street abutting his residence. As a result of the change, Less was confronted with a street graded and excavated to the depth of about seven feet below his home. Less claimed that his ability to use and enjoy his property had been significantly infringed, as had his access to the public street. The District Court awarded him $500, and the city appealed. In affirming the district court, this Court stated:

> Constitutions which provide that "private property shall not be taken for public use without just compensation" are but declaratory of the common law, and contemplate the physical taking of property only. Under constitutions which provide that property shall not be "taken or damaged" it is universally held that "it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation." *Root v. B.A. & P. Ry. Co.,* 20 Mont. 354, 51 Pac. 155, and cases cited. The owner of a city lot "has a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access to the street." *Bohm v. Ry. Co.,* 129 N.Y. 576, 29 N.E. 802, 14 L.R.A. 344. "These easements are property, protected by the Constitution from being taken or damaged without just compensation." *Root v.*

> *B.A. & P. Ry. Co., supra.* Moreover, it may frequently occur that "the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property." *City of Atlanta v. Green,* 67 Ga. 386.

Less, 28 Mont. at 32, 72 P. at 141 (other citations omitted).

¶ 66 Subsequently, in *Knight v. City of Billings,* 197 Mont. 165, 642 P.2d 141 (1982), we were called upon to address plaintiffs' complaints for inverse condemnation arising out of the improvements to 24th Street in Billings, which expanded the roadway to such an extent that the parties' front yards were unusable and the noise and traffic horrific for the homes now virtually atop these new traffic lanes. Relying upon *Less* and the "or damaged" language of Article II, Section 29, we concluded that the private property interests of the plaintiffs had been interfered with to such an extent as to constitute a "taking" by inverse condemnation. We cautioned, however, that our holding was limited to the unique situation before us "where a physical taking across the street occurred." *Knight,* 197 Mont. at 174, 642 P.2d at 146.

¶ 67 It thus appears that the "or damaged" language of the provision has been interpreted to apply to eminent domain proceedings, including inverse condemnation proceedings, where private property is taken or damaged for public use. In fact, during the debate over the 1972 Montana Constitution, the

committee discussed this provision strictly in the context of eminent domain proceedings, using property taken for highway construction as the primary example in explaining what occurs when the offer by the government is, for example, too low or too high. *See* Montana Constitutional Convention, Verbatim Transcript, March 9, 1972, pp. 1825-28.

¶ 68 Notably, the California state constitution contains the identical language as Article II, Section 29. California courts have, over the history of this provision, repeatedly been asked to expand the circumstances under which a private property owner may recover, with proponents contending that the "or damaged" language infers an intention to expand the scope of the provision outside the realm of eminent domain or public works. California courts have resisted this notion. As recently as 1995, in the case of *Customer Co. v. City of Sacramento,* 10 Cal.4th 368, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995), the Supreme Court of California, sitting en banc, rejected an attempt by a store owner to recover damages to his store occasioned by police action that was taken to enforce criminal laws. The court stated that "[t]he California Constitution of 1879 added the phrase 'or damaged' to the just compensation provision, but this change was not intended to expand the scope of the constitutional compensation provision beyond the ambit of eminent domain and public improvements."*Customer Co.*, 41 Cal.Rptr.2d 658, 895 P.2d at 906 (citation omitted).

¶ 69 The point of the foregoing discussion is that the "or damaged" language of Article II, Section 29 is intended to apply to damage to real and private property occasioned by a taking of real property for public use. Neither the 1889 or 1972 Montana Constitutions evince any intent that it apply to regulatory takings or damages resulting therefrom. Moreover, the provision mandates that private property not be taken or damaged for public use without just compensation "having been first made to or paid into court for the owner." This language obviously contemplates a condemnation of property by the State, and the recognition that the appropriation will cause determinable consequential damages to property owners affected thereby-damages which can be ascertained at the time of the taking. Simply put, the plain language of Article II, Section 29 does not suggest that the provision was intended to apply to the types of damages a regulatory taking might arguably cause over time, after a regulation has taken its toll on a property owner. And, notably, neither the appellants nor the Dissent have cited a single case for the proposition that the "or damaging" language – which, incidentally, is present in roughly half of the state constitutions in this country, *see Kafka*, ¶ 30, n. 5 – is intended to provide any greater protections in the regulatory taking context than does the Fifth Amendment to the U.S. Constitution, or that it applies to anything other than the consequential damages to the property of persons affected by a physical condemnation, or similar actions, initiated by the State.

¶ 70 The Dissent claims to have contradicted this proposition by citing to *Wild Rice River Estates v. City of Fargo,* 705 N.W.2d 850 (N.D.2005), and *Manufactured Housing Communities v. State,* 142 Wash.2d 347, 13 P.3d 183 (2000). However, an examination of these cases confirms the accuracy of the analysis and conclusions presented in this Opinion with respect to the meaning of the "or damaged" language in Article II, Section 29.

¶ 71 *Manufactured Housing* did involve a regulatory taking claim under the Washington State Constitution, employing an analysis which was distinct from that employed under the Fifth Amendment. *Manufactured Housing,* 13 P.3d at 187. However, this case is not supportive of the Dissent's criticism. First, *Manufactured Housing* did not discuss the meaning of the "or damaged" language in the Washington State Constitution in the context of a regulatory takings claims. Thus, the significance of the Dissent's citation to this case in the present context is unclear. Second, the Washington takings test has four distinct inquiries, which are grounded partly in federal and partly in state law. *Manufactured Housing,* 13 P.3d at 187. The Dissent, however, does not propose a distinct new test, or indeed, any analogous test. Rather, the Dissent simply argues that the federal tests should not apply, and that, instead, whenever there is any damage to private property by state action, compensation is required – whether the action was actually a taking or not. This amounts to a radically scaled-back *Penn*

Central analysis: There need be no inquiry into the character of the government action or the reasonable investment-backed expectations of the claimant; rather, the only inquiry is whether there was any economic impact. Since the Dissent does not provide any guidance or bright line as to how much economic impact is enough to trigger a damaging – relying more on a "I know it when I see it" reflex (*see* Dissent, ¶ 167) – it is difficult to envision how the State could confidently afford to regulate anything under such a regime. Arguably, any private property owner whose property was "damaged" by state action, whether in the form of restrictions, fees, or regulations, would be entitled to seek compensation therefore from the public fisc. As Justice Holmes noted in *Pennsylvania Coal,* "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 394, 43 S.Ct. 158, 159 (1922).

¶ 72 Moreover, while *Wild Rice* did discuss the "or damaged" language in the North Dakota State Constitution, neither *Wild Rice* itself, nor the cases upon which it relied, involved or discussed any regulatory takings claims. In *Wild Rice*, the North Dakota Supreme Court, in interpreting identical language in its state constitution stated the following:

> Under N.D. Const. art. I, § 16, "[p]rivate property shall not be taken or damaged for public use without just compensation." This Court has said our state constitutional

> provision is broader in some respects than its federal counterpart because the state provision "'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.'"

Wild Rice, 705 N.W.2d at 856 (quoting *Grand Forks-Traill Water Users, Inc. v. Hjelle,* 413 N.W.2d 344, 346 (N.D.1987)).

¶ 73 *Wild Rice* relied upon *Grand Forks,* which in turned relied upon *Donaldson v. City of Bismarck,* 71 N.D. 592, 3 N.W.2d 808, 816 (1942). *Donaldson,* in turn, relied upon *King v. Stark County,* 67 N.D. 260, 271 N.W. 771 (1937). None of these cases applied the "or damaged" language in the context of a regulatory takings claim even remotely similar to the claim at bar. However, in *King,* the North Dakota Supreme Court specifically described the meaning of the "or damaged" language in its state constitution. Because the analysis is *King* is instructive regarding the Dissent's contentions, we quote it at length:

> When the Fifth Amendment to the Constitution of the United States was adopted, it was therein provided that private property could not be taken by the United States for public use without just compensation. And the earlier State Constitutions likewise so provided. But this guaranty was too narrow. It insured compensation only in those cases where property was taken. The severity of the rule and the injustice resulting from its application were recognized. In England, by

act of Parliament, compensation has been allowed since 1845 for damage caused by the construction of public works. In this country a wide diversity in the holdings of the courts of the several jurisdictions arose as to the meaning of the terms "taken" and "damaged."

In 1870, the people of the State of Illinois amended their Constitution so that it provided that property should not be taken or damaged for public use without just compensation. And when the Constitution of the State of North Dakota was adopted this provision was inserted therein as section 14. Its history has been traced and its effect somewhat considered by this court heretofore. Nearly all of the State Constitutions now contain this provision. Under it the courts have uniformly held that there is liability not only for property taken, but also for consequential damages to property arising from the acts of the authorities in constructing public works. It is not necessary that there be a direct injury to the property itself in order to create this liability. It is sufficient to warrant a recovery if there be "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." And the diminution in value of property resulting from the acts

> complained of is special and peculiar within the meaning of the rule.

King, 271 N.W. at 773-74 (internal citations omitted).

¶ 74 The Dissent faults the Court for its "originalist" approach to Article II, Section 29, and for declining to adopt its construction of Article II, Section 29. Begging the question of why "originalist" is equivalent to "abhorrent," (*see* Dissent, ¶¶ 173, 178), the fact is that virtually none of the legal rhetoric and argument posited by the Dissent here was presented by the appellants themselves – either in the District Court or before this Court. We routinely admonish parties that we do not consider a party's change in legal argument, or new theories raised on appeal. *State v. Rahn*, 2008 MT 201, ¶ 22, 344 Mont. 110, ¶ 22, 187 P.3d 622, ¶ 22. Based on the issues actually raised and argued by the parties, and their failure to either effectively address our existing jurisprudence under Article II, Section 29, or argue for an expansion of existing law, we conclude that appellants have failed to establish that in the regulatory takings context, the "or damaged" language in Article II, Section 29 of the Montana Constitution affords more expansive rights than does the Fifth Amendment to the U.S. Constitution. Accordingly, we hold that the District Court did not err in concluding that the takings analysis based on federal law under *Penn Central* applied to the regulatory takings claims brought against the State in this case.

¶ 75 **Issue Four:** *Did the District Court err in denying appellants' claim that I-143 affected a categorical taking of their personal property?*

¶ 76 In its Decision and Order of October 22, 2004, the District Court rejected the notion that appellants' alternative livestock could be the object of a categorical takings claim under *Lucas*. A categorical taking occurs when a regulation or state action forces an owner to sacrifice all economically beneficial uses in the name of the common good, leaving the property "economically idle." *Kafka*, ¶ 68. In *Lucas*, the United States Supreme Court seemed to imply that such categorical takings claims could apply only to land, and not to personal property:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s

> long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. [393] at 413, 43 S.Ct. [158], at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). *See Andrus v. Allard,* 444 U.S. 51, 66-67, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027-28, 112 S.Ct. at 2899-2900 (footnotes omitted).

¶ 77 The District Court recognized that the Federal Circuit Court of Appeals has seemingly concluded that personal property could be the object of a categorical takings claim, *see e.g., Maritrans,* 342 F.3d at 1353-54, but chose to rely upon *Lucas* and concluded that private property, such as the alternative livestock in this case, could be the object of a regulatory, but not categorical, takings claim.

¶ 78 The appellants argue that the District Court erred in this conclusion as well. They argue that the portion of *Lucas* relied upon by the District Court is dicta, and further assert that no appellate court in the country has ever stretched this language in *Lucas* to preclude categorical takings of personal property. Instead, appellants urge this Court to rely upon *Maritrans* and conclude that their alternative livestock and related equipment can form the object of a categorical taking.

¶ 79 We agree with the appellants that some courts in the Federal Circuit seem to have entertained claims for categorical takings of personal property. In *Maritrans,* for instance, the Federal Circuit Court of Appeals considered whether a change in federal shipping regulations requiring oil carriers to use double hull tank barges caused a private company to sacrifice all economically beneficial uses of its single hull tank barges. *Maritrans,* 342 F.3d at 1354. Ultimately, the Federal Circuit Court of Appeals determined that no categorical taking of the ships had occurred, because the single hull ships still retained some beneficial use after the change in regulations. *Maritrans,* 342 F.3d at 1354-55.

¶ 80 Ultimately, we need not resolve the question of whether personal property, by itself, can form the object of a categorical takings claim.[3] Even if

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[3] However, we do note that, contrary to appellants' claims, some courts have interpreted *Lucas* in just such a manner. *See,*

(Continued on following page)

a categorical taking of appellants' alternative livestock and related equipment was cognizable, we would nevertheless conclude that their categorical takings claims fail because the alternative livestock still have beneficial uses after the passage of I-143, as the District Court concluded. The alternative livestock could be sold to out-of-state breeder operations or harvested for their meat and antlers. Granted, this may not be a profitable use of the alternative livestock, but in order to make a claim for a categorical taking, appellants must show that I-143 took *all* of the property's economically beneficial use.[4] *See Lucas,* 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8. Indeed, as the *Maritrans* court itself noted,

> Taking away a property's most beneficial use does not by itself constitute a compensable taking. *Andrus,* 444 U.S. at 65-66, 100 S.Ct. 318. In *Andrus,* the Court stated that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Id.* Only where Congress takes away every

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e.g., Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 441 (8th Cir.2007) (holding that *Lucas* categorical taking rule "protects real property only").

[4] The reasons why the out-of-state markets were not profitable are beyond the scope of a categorical takings analysis. Indeed, in this case it would be difficult, if not impossible, to isolate just how much of the profitability of sale to out-of-state markets was affected by previous outbreaks of CWD on Game Farms in Montana, or on other market forces unrelated to the passage of I-143.

> beneficial use does a categorical taking occur. *Id.*

Maritrans, 342 F.3d at 1354.

¶ 81 Accordingly, while we express no view on whether a *Lucas* categorical takings analysis could apply to takings of personal property, we hold in this case that appellants have failed to demonstrate that a categorical taking has occurred. Thus, we affirm the District Court.

¶ 82 **Issue Five:** *Did the District Court err in concluding that I-143 did not effect a regulatory taking of appellants' private property?*

¶ 83 In its Findings of Fact, Conclusions of Law, and Order dated May 2, 2005, the District Court denied appellants' claims for regulatory takings under *Penn Central*. *See Kafka*, ¶¶ 66-72 (describing in detail the three-factor *Penn Central* regulatory takings analysis). Under the economic impact factor of this analysis, *see Kafka*, ¶ 72, the District Court made the following findings: (1) I-143 prohibited the Wallaces' fee-shooting business entirely, and eliminated the in-state market for the Buhmanns but did not prohibit the sales of their elk and Sweet Pro feed supplements to out-of-state buyers; (2) neither the Wallaces nor Buhmanns lost any significant value in their land or improvements; (3) both the Wallaces and Buhmanns lost substantial value in their elk herds; (4) both parties lost future expected profits; (5) both businesses had already been negatively affected by prior outbreaks of CWD, and that CWD was in fact

one of the reasons why appellants could not profitably dispose of their alternative livestock to out-of-state markets; and (6) the Wallaces had already made a decision to get out of the Game Farm business prior to the passage of I-143. Based on these findings, the District Court concluded that the economic impact factor of the *Penn Central* regulatory takings analysis test favored the appellants.

¶ 84 With respect to the appellants' "investment-backed expectations," *see Kafka,* ¶ 72, the District Court found that, while the appellants knew that the Game Farm industry was highly controversial and heavily regulated, the appellants relied on the regulatory scheme in place when they entered the industry, and had invested significant sums of money on the expectation that the industry would never be regulated out of business. However, the District Court noted that under *Penn Central*, this investment-backed expectation is measured from an objective standpoint in terms of its reasonableness. The District Court, citing to *Mitchell Arms, Inc. v. United States,* 7 F.3d 212 (Fed.Cir.1993) and *Allied-General Nuclear Servs. v. United States,* 839 F.2d 1572 (Fed.Cir.1988), *see Kafka*, ¶¶ 58-59 (discussing *Mitchell Arms* and *Allied-General*), noted that courts have held such investment-backed expectations to a very high standard when claimants are operating in highly regulated fields such as firearms exportation (*Mitchell Arms*) and plutonium recycling (*Allied-General*). Moreover, claimants operating in such fields should expect that the government can effectively

regulate them out of business. In this regard, the District Court distinguished a case relied upon by appellants, *Yancey v. United States,* 915 F.2d 1534 (Fed.Cir.1990), and held that this factor weighed in favor of the State and against finding a compensable taking.

¶ 85 Finally, with respect to the "character of the governmental action" prong, *see Kafka,* ¶¶ 70-71, the District Court concluded that this factor weighed in favor of the State because I-143 was a valid exercise of the State's police power to protect health and welfare, and that it affected an industry which was already subject to significant governmental regulation.[5]

¶ 86 Appellants maintain that the District Court erred in balancing the *Penn Central* factors and concluding that I-143 did not effect a taking of their private property, in particular the alternative livestock and specialized Game Farm equipment. With respect to the economic impact factor, appellants agree with the conclusion that this amounted to a significant impact. However, appellants assert that the District Court understated this impact because it evaluated the business as a whole, including the real estate (which had appreciated in spite of I-143), when appellants argue they did not claim a taking of their

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[5] The District Court's analysis under this factor, as it inquired to a certain extent into the purpose and propriety of I-143, would no longer be valid under *Lingle. See* ¶ 16 n. 2.

real property, but only of the business itself. They assert that a finding that I-143 led to a fifty-percent reduction in their business is misleading because it includes in the computation the value of appreciated real estate. Instead, the Wallaces argue the impact should be measured in terms of the market value of the alternative livestock before I-143 ($5.5 million dollars), versus its market value afterwards ($238,000). Similarly, the Wallaces argue that the true economic impact on their business by I-143 was that it destroyed it. The Buhmanns maintain I-143 had a similar impact on their business as well.

¶ 87 With respect to the character of the governmental action factor, appellants argue that this factor also weighs in favor of a compensable taking because I-143 does not address the problems associated with Game Farms (i.e., threat from CWD, or threatening the heritage of fair chase hunting) since it still permits the existence of Game Farms. In actuality, appellants argue, I-143 is nothing more than a price control measure designed to protect the State's competing enterprise of selling licenses for the shooting of wild, non-captive game. Finally, under the investment-backed expectations factor, appellants maintain that the District Court erred in relying upon *Mitchell Arms* and *Allied-General,* and that an analysis under *Yancey* supports their position. Appellants argue that they are not complaining that a particular regulation has made Game Farms more expensive, but that I-143 directly prohibited the sale of a product in a manner contrary to their reasonable

investment-backed expectations, because the State has never exercised any regulation over the fees charged for privately shooting alternative livestock. While the participants in the Game Farm industry might have reasonably expected that they would have to maintain extra fencing or increase testing of their livestock, they had no reason to anticipate state interference in the price they would be able to charge for fee-shooting. Thus, they argue, this factor should weigh in their favor.

¶ 88 As we noted at the outset of this Opinion, many of the arguments raised in the case at bar were previously addressed in *Kafka*. At this point, we will highlight the relevant portions of the *Kafka* decision insofar as they address appellants' challenge to the District Court's *Penn Central* analysis. As an initial matter, we note that because the appellants in this case, like those in *Kafka*, allege that a mix of property interests have been taken by I-143, and do not allege that I-143 took all of their property interests (i.e., appellants do not claim that I-143 impacts the real property comprising their Game Farms at all) we will consider each of those business interests separately for purpose of a regulatory takings analysis. *Kafka*, ¶ 37.

¶ 89 Regarding the regulatory taking of intangible assets, i.e., appellants' businesses in this case, we held in *Kafka* that businesses themselves cannot be taken unless the government physically condemns those businesses and runs them itself. *See Kafka*, ¶¶ 55-63. In *Kafka* we analyzed both the

Mitchell Arms and *Allied-General* decisions in reaching this conclusion. Therefore, for the reasons set forth in *Kafka*, we hold that appellants' businesses in this case were not taken by I-143.

¶ 90 Accordingly, this leaves appellants' elk and related Game Farm equipment. Under the economic impact prong of *Penn Central*, we agree with the District Court that I-143 had a significant impact on the value of the Wallaces' and Buhmanns' alternative livestock. For purposes of this factor, the District Court found that the Wallaces had invested approximately $666,166 in elk purchases from 1997 through 1999. Before I-143 the market value of the alternative livestock (approximately 850 head of elk) was roughly $5.5 million; after I-143, the Wallaces liquidated the herd for $238,000.[6] The Wallaces' Game Farm equipment (the specialized feeding trucks) were purchased for roughly $600,000 and sold for $150,000. The Buhmanns similarly had invested in the alternative livestock, and although the ban on fee-shooting did not directly prohibit them from breeding

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[6] In this case, appellants did not provide any expert testimony concerning the change in the fair market value of the alternative livestock before and after I-143. In *Kafka*, expert testimony was in fact presented showing that alternative livestock before I-143 was worth $5,000 per head, while after I-143 the livestock was worth $500 per head. This represented a roughly 90% devaluation. *Kafka*, ¶ 84. Here, no comparable testimony was provided. However, given the size of the Wallaces' herd (850 elk) and utilizing the evaluation figures employed in *Kafka*, the Wallaces' herd lost approximately 95% of its fair market value.

alternative livestock, it did cause a similar devaluation in their herd and also impacted their ability to sell Sweet Pro in Montana. Accordingly, the economic impact factor weighs in appellants' favor.

¶ 91 However, with respect to the appellants' investment-backed expectations and character of the governmental action factors, we agree with the District Court that these factors weigh against finding a compensable taking. As we noted in *Kafka,* while I-143 impaired the profitable use of alternative livestock, it still allowed appellants every other use of their alternative livestock; thus, from the perspective of regulatory takings law, the character of the governmental action embodied in I-143 had a minimally intrusive effect on appellants' bundle of property interests in the alternative livestock. *See Kafka,* ¶¶ 87-88. The same would be true with respect to the Wallaces' specialized Game Farm equipment, as it could still be sold to out-of-state markets. Thus, while we disagree with the analysis employed by the District Court under this factor because it inquired into the purposes and propriety of I-143 in a manner foreclosed by *Lingle, (see* Opinion, ¶ 80), we nonetheless agree with the District Court's conclusion that this factor weighs against finding a compensable taking. *See Wells Fargo Bank v. Talmage,* 2007 MT 45, ¶ 23, 336 Mont. 125, ¶ 23, 152 P.3d 1275, ¶ 23 (stating that we will affirm a district court's decision even if it reaches the right result for the wrong reason).

¶ 92 Similarly, under the investment-backed expectations prong, the regulative and speculative nature of the industry does play a significant role in determining whether a certain set of investment-backed expectations are "reasonable." As we did in *Kafka,* we conclude that appellants in this case could not maintain a reasonable investment-backed expectation that Game Farms, and by extension fee-shooting, would always be legal in Montana. *See Kafka,* ¶¶ 89-93. In this connection, we agree with the District Court that *Yancey* does not alter the regulatory takings analysis in this case. In *Yancey,* Andrew and Elizabeth Yancey (Yanceys) owned and operated a turkey breeding operation in Rockingham County, Virginia. *Yancey,* 915 F.2d at 1536. In 1983, the Yanceys acquired a rafter of turkey breeder hens for purposes of selling the hatching eggs to customers in other states. In mid-October 1983, an outbreak of a pathogenic Avian Influenza occurred in Lancaster County, Pennsylvania, prompting the United States Department of Agriculture (USDA) to impose a quarantine in that state, which was later extended to Rockingham County, Virginia as well. The quarantine prohibited the Yanceys from the interstate shipping of live poultry, manure from the poultry, litter used by the poultry, as well as carcasses, eggs and certain equipment. Although the Yanceys' flock was not affected by the influenza, they were unable to make productive use of the flock as they intended, and had to maintain the flock at a cost of $1,800 per week. They ultimately decided to slaughter the flock and sell it for meat, although the flock had not been

raised to be economically viable for that purpose. They received $20,887 for the flock.

¶ 93 The Yanceys subsequently filed a $63,566 indemnity claim with the USDA, representing the lost value from the flock as a result of the quarantine. The claim was denied and they filed a takings claim in the U.S. Claims Court under the Fifth Amendment. The claims court granted the Yanceys' Fifth Amendment claim, and the government appealed. On appeal, the Federal Circuit Court of Appeals had to determine whether the effects of the quarantine constituted a compensable taking under the Fifth Amendment. *Yancey,* 915 F.2d at 1539.

¶ 94 The *Yancey* court applied the regulatory takings analysis from *Penn Central*. It noted that the claims court had found that the Yanceys' flock had suffered a 77% devaluation as a result of the quarantine, because the healthy breeder flock would have been worth $91,616 if the quarantine had not been in place, and, further, that the Yanceys had no other alternative viable use for the flock other than slaughtering them so long as the quarantine remained in place. *Yancey,* 915 F.2d at 1539. Moreover, the court of appeals noted the lower court finding that the Yanceys only learned about the quarantine through the newspaper the day before it took effect and that they had investment-backed expectations to sell the hatching eggs to customers outside of Virginia – an action that was foreclosed by the immediate, unforeseen and disparate impact upon the Yanceys by the quarantine. *Yancey,* 915 F.2d at 1540.

¶ 95 In affirming the claims court's decision, the *Yancey* court explicitly distinguished its case from *Galloway Farms, Inc. v. United States,* 834 F.2d 998 (Fed.Cir.1987). In *Galloway Farms,* the Federal Circuit Court of Appeals held that a grain embargo imposed against the Soviet Union by President Jimmy Carter did not give rise to a compensable takings claim on behalf of grain farmers in the United States, in part because the grain embargo left open other markets. *Galloway Farms,* 834 F.2d at 1003. The *Yancey* court found its case distinguishable because the claims court had found that the Yanceys had no other choice but to sell their turkeys for substantially less than their value, while the grain farmers in *Galloway Farms* still had available markets. *Yancey,* 915 F.2d at 1541-42. The court concluded that "[w]hen adverse economic impact and unanticipated deprivation of an investment backed interest are suffered, as when the poultry quarantine forced the Yanceys to sell their turkey flock, compensation under the Fifth Amendment is appropriate." *Yancey,* 915 F.2d at 1542.

¶ 96 We agree with the District Court that *Yancey* is distinguishable from the present case with respect to the investment-backed expectations factor of the *Penn Central* analysis. As a threshold matter, we note that the investment-backed expectations are measured from an objective, not subjective, standpoint of reasonableness. *See Cienega Gardens v. United States,* 331 F.3d 1319, 1346 (Fed.Cir.2003) ("This factor also incorporates an objective test – to

support a claim for a regulatory taking, an investment-backed expectation must be 'reasonable.'"). Moreover, the inquiry into the reasonableness of the investment backed expectation is unique to each case and cannot be reduced to any "set formula." *See Palazzolo v. R.I.*, 533 U.S. 606, 636, 121 S.Ct. 2448, 2467, 150 L.Ed.2d 592 (2001) (O'Connor, J., concurring).

¶ 97 In *Yancey,* the Court of Appeals was bound by factual determinations from the Court of Claims which supported the conclusion that the quarantine in that case was completely unexpected. The findings by the District Court in this case cut the other way, because the District Court noted that under an objective standard of reasonableness, the appellants could not maintain an expectation that the Game Farm industry would be permitted to continue indefinitely. The District Court specifically found that a previous outbreak of CWD on a Montana Game Farm in 1997 had already impeded the Wallaces' sale of alternative livestock to out-of-state markets after the imposition of a moratorium on out-of-state sales, and that their ability to sell the Big Velvet Ranch before the passage of I-143 was negatively impacted from the previous CWD outbreaks. Additionally, the appellants were aware of the highly controversial nature of Game Farms and the fact that CWD presented significant risks making it a highly regulated industry.

¶ 98 With respect to the "reasonableness" of investment-backed expectations, the analogy between the Game Farm industry and other industries such as

the importation of firearms discussed in *Mitchell Arms,* or the plutonium recycling industry discussed in *Allied-General,* is actually quite apt, because at the time these Game Farms were in existence, CWD posed a very serious threat to the native elk and deer populations within Montana, given that it was impossible to completely prevent alternative livestock from escaping the confines of a Game Farm. Moreover, there was no live test for CWD which is a permanent and irreversible disease. *Hagener,* ¶ 25.[7] Moreover, the District Court explicitly found that the exact incubation period and means of transmitting CWD are not completely understood. In fact, it was primarily the grave threat posed by CWD which required the extensive regulation of the Game Farm industry in Montana. *See Kafka,* ¶ 8. It was against the backdrop of these inherent dangers that appellants were operating. Moreover, these dangers were publicly known and very controversial among many members of the public. Thus, unlike *Yancey,* where the poultry producers would have no reason to expect that a healthy flock of turkeys would have to be suddenly destroyed, those in the Game Farm industry knew that their alternative livestock carried with them an inherent danger of spreading CWD which could never be eliminated and which could

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[7] As we noted in *Hagener,* it was limitations on testing for CWD which led the legislature to impose a moratorium on new Game Farms in 2000. This moratorium was a response to an outbreak of CWD on a Phillipsburg Game Farm in 1999. *Hagener,* ¶ 25.

prove uncontrollable if it made its way into the genetic make-up of the native wildlife populations. These facts, together with the highly regulated nature of the industry, must be considered when evaluating the "reasonableness" of appellants' investment-backed expectations.

¶ 99 As we noted in *Kafka,* the *Penn Central* analysis calls for a balancing of the factors in order "'to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.'" *Kafka,* ¶ 94 (quoting *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082). After weighing the factors in the case, we conclude that the economic impact factor weighs in favor of a compensable taking, while the character of the governmental action and reasonable investment-backed expectations factors do not. Accordingly, for the same reasons we denied similar claims in *Kafka,* we conclude the District Court did not err in denying appellants' regulatory takings claims. *See Kafka,* ¶ 94.

CONCLUSION

¶ 100 Based upon the foregoing, we affirm the District Court.

We concur: KARLA M. GRAY, W. WILLIAM LEAPHART and DEBORAH KIM CHRISTOPHER[8*], JJ.

Justice JIM RICE, concurring in part and dissenting in part.

¶ 101 I concur with the Court's resolution of Issues One, Two and Three. I dissent from Issues Four and Five, as I would hold that a taking of Plaintiffs' property was effectuated by the enactment of I-143 under the analysis provided by Justice Nelson's dissenting opinion in *Kafka*.

Justice JAMES C. NELSON, dissenting.

¶ 102 I dissent from the Court's decision on Issues Three, Four, and Five. I do so for the reasons articulated in my dissent in the companion case, *Kafka v. Montana Dept. of Fish, Wildlife and Parks*, 2008 MT 460, ¶¶ 96-248, 348 Mont. 80, ¶¶ 96-248, 201 P.3d 8, ¶¶ 96-248, 2008 WL 5413504 (Nelson, Rice, & Swandal, JJ., dissenting) (hereinafter, "*Kafka Dissent*"), and for the additional reasons set forth below. I do not express any views on the Court's resolution of Issues One and Two.

[8*] District Court Judge DEBORAH KIM CHRISTOPHER sitting for Justice JOHN WARNER.

I. INTRODUCTION

¶ 103 As it did in *Kafka,* the Court again holds that business owners in the alternative livestock industry are entitled to no compensation whatsoever for the outright destruction of their businesses by Initiative No. 143 ("Initiative" or "I-143"). The State encouraged people to embark on this "viable economic opportunity," facilitated their investment of millions of dollars into such enterprises, and granted them a statutory right to perpetual renewal of their business licenses. Then, the State up and legislated the businesses out of existence. According to the Court, such action does not constitute a taking or damaging of property under Article II, Section 29 of the Montana Constitution.

¶ 104 In reaching this conclusion, and in spite of the plain language of Article II, Section 29, the Court makes the astounding pronouncement that Article II, Section 29 is little more than a constitutional redundancy – an empty provision guaranteeing nothing beyond what the federal courts deem compensable under the Fifth Amendment to the United States Constitution. This pronouncement finds no support in the text of Article II, Section 29, which is facially broader than the Fifth Amendment. It finds no support in the history of Article II, Section 29 and its predecessor, Article III, Section 14 of the 1889 Constitution, which were intended to provide greater protection than the Fifth Amendment against infringements on Montanans' property rights. It finds no support in the prior decisions of this Court, which

recognize independent protections of property under the Montana Constitution. And it is contrary to the Constitutional Convention delegates' charge that this Court "revitalize" the civil rights of Montanans.

¶ 105 Rather, the Court's decision is based on one single proposition: that the delegates to the 1889 and 1972 Constitutional Conventions and the voters who approved these Constitutions intended for the meaning of "taking" and "damaging" property to be frozen in time. Adopting an originalist interpretation of Article II, Section 29, the Court rejects the notion that the terms "taking" and "damaging" together were meant to provide a broader range of protection than extant Fifth Amendment jurisprudence provides. Instead, the Court prefers to restrict Article II, Section 29 to only those situations which were not covered by the Fifth Amendment in the late nineteenth century: "determinable consequential damages" resulting from public works projects. I strenuously dissent from this emasculation of Article II, Section 29.

¶ 106 Both the Fifth Amendment and Article II, Section 29 require just compensation for the taking and damaging of property effected by I-143. I comprehensively analyzed this issue under the Fifth Amendment in *Kafka* (*see Kafka Dissent*, ¶¶ 177-240); and since there are no material factual distinctions between *Kafka* and the present case, it is not necessary to repeat that analysis here. Rather, I focus in this Dissent primarily on Article II, Section 29 and explain why, contrary to the Court's decision, this

provision entitles the Buhmanns and the Wallaces (collectively, "the Ranchers") to just compensation. First, however, I address several factual and legal issues argued by the Sportsmen, the State, and the Ranchers in this case. I addressed some of these issues in *Kafka;* accordingly, I simply reiterate the critical points here as foundation for the ensuing analysis.

II. PRELIMINARY FACTUAL AND LEGAL ISSUES

A. The Sportsmen's Explanation of I-143

¶ 107 It has been a lawful "business or occupation" in this State since 1917 to acquire, breed, own, harvest, sell, and otherwise control privately owned game animals on an alternative livestock ranch.[1] This activity has been regulated, and the regulations have become more rigorous over the years. At the same time, however, the Legislature has enacted provisions designed specifically to protect the business owners' interests – e.g., through statutory recognition of their alternative livestock as "private property" and their businesses as "viable economic opportunities," and through the statutory guarantee that their alternative livestock ranch licenses would

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[1] The Court prefers the term "game farm." Opinion, ¶ 3. The statutory scheme, however, uses the term "alternative livestock ranch." *See* § 87-4-406(2), MCA. "Game farm" is nowhere mentioned. Accordingly, I use the term "alternative livestock ranch."

be renewed each year upon payment of the renewal fee and compliance with all recording and reporting requirements. *See generally Kafka Dissent,* ¶¶ 103-109.

¶ 108 I-143, which was passed on November 7, 2000, gutted the alternative livestock industry and rendered the regulatory scheme pointless. The Sportsmen, who were "the principle forces behind the passage of I-143," sought to snuff out alternative livestock ranching without the public's having to foot the bill. To that end, they "carefully crafted" a citizen initiative (I-143) to prohibit remuneration for shooting alternative livestock on alternative livestock ranches, thereby forcing all businesses in the industry to operate, essentially, without any income. *See Kafka Dissent,* ¶¶ 114-120. As counsel for the Sportsmen explained during oral argument:

> There was a recognition by my clients that if they passed a statute that simply said, "Every game farm is done tomorrow," that that would be a very difficult takings claim to defend against. And we didn't want to have to go down that road. And so the statute was carefully crafted to address the problem in a way that was not offensive to taking but at the same time benefitted the wildlife and the wildlife management of this State.

The assertion that the Sportsmen's transparent charade is "not offensive" to the guarantee of just compensation for a taking

> or damaging of private property is preposterous.

¶ 109 In any event, the Sportsmen did not detail their intentions to the voters. Rather, according to the Sportsmen, "[f]oremost among the issues presented to the voters in I-143 were concerns about disease, loss of fair chase hunting ethics and European style privatization of wildlife." In other words, the Sportsmen told the voters not that I-143 had been "carefully crafted" to obliterate an entire industry – an industry that had been sanctioned, encouraged, and nurtured by the State for 83 years, no less – but that I-143 was "aimed" at the alluring goal of "protecting Montana's wildlife and hunting heritage from a variety of dangers posed by game farms." An analysis of the Initiative, however, reveals that it did not actually address any of these dangers. As a matter of fact, the Sportsmen tacitly admit that I-143 was a fraud on Montana voters.

¶ 110 For instance, regarding disease, the Sportsmen paint a grim picture. They state that "[c]ontact between game farm animals and wildlife can result in disease and parasite transmission, with devastating impacts to native wildlife." They complain that "[g]ame farm enclosures require only a single fence and do not prevent nose to nose contact between wild ungulates and game farm animals." Plus, "[i]t is virtually impossible to keep game farm animals from coming into contact with wild animals, as escaped animals are a fact of life for game farm owners." Moreover, aside from direct contact, "[s]ome

diseases are transmitted by intermediate hosts, making any form of enclosure ineffective for disease prevention."

¶ 111 The Sportsmen argued these concerns to the voters. Indeed, the Sportsmen cite the 2000 Voter Information Pamphlet for the proposition that "[o]ne of I-143's primary purposes was to minimize the CWD threat to Montana's wildlife." ("CWD" is short for "chronic wasting disease.") Accordingly, given these concerns, one would expect I-143 to target the problems related to diseases, perhaps through more stringent fencing and enclosure requirements, additional testing requirements, or even an outright seizure of all alternative livestock along with a prohibition on private ownership of alternative livestock. However, I-143 did none of these things. As the Sportsmen acknowledge, "[g]ame farms licensed prior to November 2000, are still legal in Montana, even after I-143," and "[g]ame farm operators are free to 'acquire, breed, grow, pursue, handle, sell or dispose' of game farm animals." I-143 imposed no new fencing or testing requirements. It does not prohibit people from owning alternative livestock on alternative livestock ranches, and it does not address the problem of transmission of diseases through intermediate hosts or inadequate fencing. In spite of the dire threat posed by diseases, the Sportsmen's initiative contains nothing addressing that issue.

¶ 112 As for hunting ethics, the Sportsmen state that "Montana has a proud heritage of ethical hunting and the protection of wildlife, and I-143 was

intended to protect the state's interest in those traditions." They assert that "[i]n addition to the enormous economic benefits of traditional big game hunting, Montanans hold dear their hunting tradition as an important component of their western heritage," particularly "the concept of fair chase hunting." The Sportsmen explain that they and other citizens "opposed the 'penned hunts' offered by many game farms" because "[s]hooting an animal in an enclosed facility is repugnant to these ethical hunting traditions." Again, citing the 2000 Voter Information Pamphlet, the Sportsmen state that "[t]he protection of fair chase hunting, as an ethical consideration for Montanans, was an integral part of I-143's provisions to eliminate penned shoots."

¶ 113 I-143, however, contains no "provisions to eliminate penned shoots." I-143 did three things: it prohibited the establishment of any new alternative livestock ranches; it revoked the right of existing alternative livestock businesses to transfer their alternative livestock ranch licenses; and it prohibited charging a fee or other remuneration for shooting alternative livestock on an alternative livestock facility. *See generally* Laws of Montana 2001, 2000 Ballot Issues, Initiative No. 143, §§ 1, 4, 6. But "shooting an animal in an enclosed facility" is still perfectly legal. Indeed, the Sportsmen concede that "[g]ame farm operators are not prohibited by I-143 from shooting or otherwise 'harvesting' their animals themselves." For that matter, I-143 does not prohibit the friends, relatives, and acquaintances of an

alternative livestock operator from shooting alternative livestock on an alternative livestock ranch. "The only activity on licensed game farms prohibited under I-143," the Sportsmen state, "is that of allowing a fee-paying individual the opportunity to personally shoot a game farm animal." But anyone who is not a "fee-paying individual" may still participate in penned hunts and "personally shoot a game farm animal" notwithstanding I-143. So much for protecting Montana's "proud heritage" of ethical, fair-chase hunting.

¶ 114 Lastly, with respect to European-style privatization of wildlife, the Sportsmen state that "[c]entral to Montana's hunting heritage is the availability of big game hunting to ordinary individuals: inexpensive licenses available to all citizens, access to big game on public and private lands . . . and plentiful populations of native wildlife." According to the Sportsmen, "I-143's proponents made this a central issue in their campaign to ban penned shoots" (citing the 2000 Voter Information Pamphlet). Yet, as the Sportsmen are forced to concede, "I-143 allow[s] the continued ownership of game farms and elk," and alternative livestock ranchers "are free to 'acquire, breed, grow, pursue, handle, sell or dispose' of game farm animals" in Montana. Moreover, I-143 does not provide for less expensive hunting licenses or greater access to big game on public and private lands.

¶ 115 In sum, the Sportsmen's initiative purported to address disease, hunting ethics, and

privatization of wildlife, but I-143 did not actually address any of these. Rather, it was "carefully crafted" to achieve the Sportsmen's ulterior goal of putting all alternative livestock ranches out of business. The Proponents' argument in favor of the Initiative was blatantly misleading in assuring voters that "[e]xisting game farms will be allowed to continue all operations, except for canned hunts." I-143 was designed to shut down *all* alternative livestock ranches by forcing them to operate with no income.

¶ 116 The Sportsmen claim that I-143 merely "added to the existing restrictions" on the operation of alternative livestock ranches. They also assert that the Ranchers have not established that the "additional restrictions" are "so onerous that the effect is the same as 'an appropriation of property through eminent domain or physical appropriation.'" This is hypocrisy personified. I-143 did not "add" to "existing restrictions." It devised a whole new restriction previously unheard of in the industry: no remuneration for shooting alternative livestock. The Sportsmen's contrary characterization of I-143 is absurd. It is one thing to strengthen fencing, testing, and reporting requirements through "additional restrictions," as the Legislature did over the years. But it is quite another to require alternative livestock ranchers to operate with no income through the expedient of prohibiting remuneration for the key economic activity on which their businesses depended: fee shooting. The Sportsmen "carefully

crafted" I-143 to destroy the Ranchers' businesses, and they succeeded in doing so. It is difficult to conceive of a regulation that more closely approximates "an appropriation of property."

¶ 117 In conclusion, the Ranchers entered the alternative livestock industry in the 1990s. Alternative livestock ranching had been in existence for over 75 years. The 1983 Legislature had enacted explicit statutory rights to protect the interests of participants in the industry. *See Kafka Dissent,* ¶¶ 105-106. As late as 1999, the State characterized alternative livestock ranching as "a viable economic opportunity for any private property owner as well as the traditional livestock producers who are interested in diversifying their ranch productivity." Section 87-4-431, MCA. Moreover, as the State reluctantly conceded at oral argument in *Kafka,* "There is some evidence to suggest that it was the policy of the political branches of government to encourage people to look at game farming as an alternative to traditional agriculture – actually, to subsidize traditional agriculture so they could stay on the farms and ranches." The Sportsmen, however, objected to alternative livestock ranching. They decided to shut down the industry. They did so for the stated purpose of "protecting Montana's wildlife and hunting heritage." They argued to the voters that I-143 was intended to benefit the entire Montana populace. Yet, the Sportsmen sought to place all of the economic costs associated with achieving this goal on the

alternative livestock ranchers. They sought, in other words, to give the public something for nothing.

¶ 118 The Sportsmen "represent the voices of thousands of Montana men and women who believe I-143 is vital to the protection of Montana's wildlife and to the tradition of fair chase hunting." According to the Sportsmen, "I-143 was designed and enacted to address very serious dangers to Montana's wildlife and fair chase hunting heritage." It has been said that the "guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). On this principle alone, it seems abundantly obvious that the costs of achieving the Sportsmen's goals must be borne by the public as a whole, not disproportionately placed on the shoulders of the alternative livestock ranchers.

B. The State's and the Ranchers' Means-Ends Arguments

¶ 119 The State asserts that a "means-ends" analysis of I-143 – i.e., inquiring whether the Initiative substantially advances some legitimate public purpose – is improper in the takings context. The State is correct, at least with respect to the Fifth Amendment. The Supreme Court has explained that the critical question in a regulatory takings analysis

is whether the regulation is "so onerous that its effect" is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 539, 125 S.Ct. 2074, 2081, 2082, 161 L.Ed.2d 876 (2005). A "substantially advances" test is ineffective for answering this question. It reveals nothing about the magnitude or character of the burden that the regulation imposes upon private property rights. Rather, it probes the regulation's underlying validity. *Lingle,* 544 U.S. at 542, 543, 125 S.Ct. at 2084. Yet,

> such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property *for public use*. It does not bar government from interfering with property rights, but rather requires compensation in the event of *otherwise proper interference* amounting to a taking. Conversely, if a government action is found to be impermissible – for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle, 544 U.S. at 543, 125 S.Ct. at 2084 (citation and some internal quotation marks omitted).

¶ 120 The Ranchers acknowledge the Supreme Court's clarifications of federal takings doctrine in *Lingle;* however, they point out that "*Lingle* did not, and in fact could not, foreclose an independent interpretation of the Montana Constitution." The Ranchers suggest that under Article II, Section 29, "[i]n order to avoid the constitutional mandate of just compensation, the State must show a compelling state interest that is narrowly tailored to impose the least restraints possible on [the Ranchers'] interests." In an alternative formulation, the Ranchers assert that "the State must demonstrate that it has employed the least restrictive means in accomplishing the purposes of I-143."While I agree with the Ranchers that this Court may – indeed, must – provide an independent interpretation of Article II, Section 29, I agree with the State that the Ranchers' proposed test is inapt for analyzing claims brought under Article II, Section 29.

¶ 121Article II, Section 29 states, in pertinent part, that "[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss." This language requires compensation where the State takes or damages private property "for public use," but it does not require the "public use" to be "compelling," nor does it require the State to employ "the least restrictive means" for achieving its goals. Rather, when considering whether a regulation has taken or damaged private property, the analysis presupposes that the regulation is permissible and the focus is

properly directed to the regulation's "effect" on the property and whether just compensation is owed. *Cf. Lingle,* 544 U.S. at 537, 543, 125 S.Ct. at 2081, 2084.

¶ 122 It thus makes little sense to inquire whether the State has employed "the least restrictive means" of achieving a "compelling" state interest. Whether or not the State has done so may tell us whether the regulation sweeps more broadly than is necessary or whether the regulation fails to meet the "public use" requirement. But it tells us nothing about the regulation's effect and the burden the regulation imposes on private property rights. In other words, it does not tell us whether property has been taken or damaged.

¶ 123 Moreover, even if the least restrictive means have been employed and even if the State's interest is compelling, the property owner still may have suffered a taking or damaging of property. In this connection, the following reasoning by the Supreme Court in *Lingle* is persuasive:

> The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners.

> The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Lingle, 544 U.S. at 543, 125 S.Ct. at 2084. For these reasons, the Supreme Court's rejection of means-ends analysis under the Fifth Amendment is sensible and should apply equally under Article II, Section 29.

¶ 124 That said, the State inexplicably proceeds to argue the converse of the Ranchers' proposed test. The State asserts that "property rights are subject to reasonable exercise of the police power" and that Article II, Section 29 does not "alter in a fundamental way the police power to adopt reasonable regulations that protect public health, safety, and welfare." Based on *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), the State insists that "the government cannot be compelled to pay compensation whenever it reasonably determines that a commercial activity is injurious to public health, safety, or welfare."

¶ 125 The State's position, in short, is that it cannot be required to pay compensation where the challenged regulation is a valid exercise of the police power related to a commercial activity. Of course, the corollary of this rule is that the government *can* be required to pay compensation where the challenged regulation is an *invalid* exercise of the police power related to a commercial activity – the very proposition

the State goes to great lengths to refute. But there are additional flaws in the State's approach.

¶ 126 First, *Mugler* stands for the limited proposition that the government need not pay compensation when it exercises its power to prohibit a noxious use of property, i.e., a use akin to a public nuisance. *See Kafka Dissent,* ¶¶ 126-129. However, alternative livestock ranching, which was done and maintained under the express authority of Title 87, chapter 4, part 4, MCA, was in no way a public nuisance, *see* § 27-30-101(2), MCA, and the State may not escape paying just compensation for the Ranchers' losses through the mere expedient of declaring that which formerly was *not* a public nuisance to have been a public nuisance all along, *see Kafka Dissent,* ¶¶ 132-134. In this regard, the State's smug condemnation of the alternative livestock industry as some sort of noxious or abhorrent threat to the public health, safety, and welfare rings hollow in light of the State's 83-year role in creating, developing, and nurturing the industry in the first place.

¶ 127 Second, the Supreme Court has explicitly rejected the notion that a valid police power regulation never requires compensation to the owner. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the Court stated that there are "limits to the non-compensable exercise of the police power." *Lucas,* 505 U.S. at 1026, 112 S.Ct. at 2899. Otherwise, if "the uses of private property were subject to unbridled,

uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas,* 505 U.S. at 1014, 112 S.Ct. at 2892-93 (brackets in *Lucas*) (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922)).

¶ 128 In conclusion, whether I-143 employs "the least restrictive means" of achieving a "compelling" state interest is irrelevant to the analysis under Article II, Section 29. Rather, in considering whether the Initiative took or damaged the Ranchers' property, the analysis presupposes that the regulation is permissible and the focus is on the regulation's effect on the Ranchers' property. Likewise, and for the same reasons, the State cannot escape paying just compensation on the ground that I-143 represents a "reasonabl[e] determin[ation] that [alternative livestock ranching] is injurious to public health, safety, or welfare."

III. ANALYSIS OF THE RANCHERS' CLAIMS

A. Analytical Framework

¶ 129 The Ranchers brought this action to recover for a regulatory taking or damaging of their property caused by the passage of I-143. Such an action, "in which a property owner, in the absence of a formal condemnation proceeding, seeks to recover from a governmental entity for the appropriation of his property interest," is commonly referred to as "inverse condemnation." Julius L. Sackman, *Nichols*

on Eminent Domain vol. 2A, § 6.03[2], 6-182.1 (3d ed., Matthew Bender 2006). Whereas a condemnation proceeding typically involves an action by the condemnor to acquire title to property, inverse condemnation is an action by the property owner against a governmental defendant to recover the value of property that has been taken or damaged, even though no formal exercise of the power of eminent domain has been attempted by the government. *See United States v. Clarke,* 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980); *see also e.g. Less v. City of Butte,* 28 Mont. 27, 72 P. 140 (1903) (inverse condemnation action to recover for damage to property occasioned by a public works project); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor. The owner's right to bring such a suit derives from the self-executing character of the constitutional provision with respect to condemnation." *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 5 n. 6, 104 S.Ct. 2187, 2191 n. 6, 81 L.Ed.2d 1 (1984) (citation and some internal quotation marks omitted).

¶ 130 As noted, Article II, Section 29 states, in pertinent part, that "[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss." In analyzing a claim for just compensation in the context of an inverse condemnation action, the court first determines whether the plaintiff possesses a constitutionally protected property interest. *See Germann v. Stephens,* 2006 MT 130, ¶ 27, 332 Mont. 303, ¶ 27, 137 P.3d 545, ¶ 27; *Seven Up Pete Venture v. State,* 2005 MT 146, ¶ 26, 327 Mont. 306, ¶ 26, 114 P.3d 1009, ¶ 26; *see also Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1000, 104 S.Ct. 2862, 2871, 81 L.Ed.2d 815 (1984) (articulating the same threshold inquiry under federal law). Whether one has a protected property interest is a question of law. *Kiely Construction v. City of Red Lodge,* 2002 MT 241, ¶ 25, 312 Mont. 52, ¶ 25, 57 P.3d 836, ¶ 25. If the plaintiff possesses a protected property interest, the court then determines whether a part or a whole of that interest has been taken or damaged for public use, thus entitling the plaintiff to just compensation. *See* Mont. Const. art. II, § 29; *Monsanto,* 467 U.S. at 1000-01, 104 S.Ct. at 2871; *Members of Peanut Quota Holders Ass'n v. United States,* 421 F.3d 1323, 1330 (Fed.Cir.2005). The issue of whether a taking has occurred is a question of law based on factual underpinnings. *Huntleigh USA Corp. v. United States,* 525 F.3d 1370, 1377 (Fed.Cir.2008).

B. Analysis of the Ranchers' Claims under Article II, Section 29.

1. General Approach

¶ 131 It is well-established that the rights enumerated in the Declaration of Rights of Montana's 1972 Constitution (i.e., those set forth in Article II) are "fundamental rights." *Walker v. State,* 2003 MT 134, ¶ 74, 316 Mont. 103, ¶ 74, 68 P.3d 872, ¶ 74; *State v. Tapson,* 2001 MT 292, ¶ 15, 307 Mont. 428, ¶ 15, 41 P.3d 305, ¶ 15; *Wadsworth v. State,* 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996). This means that each of the Article II rights is a significant component of liberty, the alleged infringement of which triggers the highest level of scrutiny and, thus, the highest level of protection by the courts. *Walker,* ¶ 74; *Wadsworth,* 275 Mont. at 302, 911 P.2d at 1174; *see also e.g. State v. Mount,* 2003 MT 275, ¶ 98, 317 Mont. 481, ¶ 98, 78 P.3d 829, ¶ 98; *Mont. Environmental Info. Center v. Dept. of Environmental Quality,* 1999 MT 248, ¶ 64, 296 Mont. 207, ¶ 64, 988 P.2d 1236, ¶ 64. For the reasons discussed earlier in Part II-B, our analysis under Article II, Section 29 does not involve "scrutiny" of the governmental action, except insofar as the requirement of a "public use" has been raised. But our analysis must afford "the highest level of protection" of private property rights. *Walker,* ¶ 74.

¶ 132 In this connection, we interpret Article II rights mindful of the other rights set out in the Montana Constitution. In *Armstrong v. State,* 1999

MT 261, 296 Mont. 361, 989 P.2d 364, we explained that

> Montana's Constitution, and especially the Declaration of Rights, is not simply a cook book of disconnected and discrete rules written with the vitality of an automobile insurance policy. Rather, our Constitution, and in particular its Declaration of Rights, encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government. It is a compact of overlapping and redundant rights and guarantees.

Armstrong, ¶ 71.

¶ 133 We accordingly have interpreted independent sections of Montana's Constitution together, so as to give effect to Article II's coordinate, overlapping, and redundant guarantees. Possibly the most repeated example of this is our interpretation of the right not to be subjected to unreasonable searches and seizures (Article II, Section 11) in conjunction with the right to privacy (Article II, Section 10). *See e.g. State v. Siegal*, 281 Mont. 250, 257-78, 934 P.2d 176, 180-92 (1997), *overruled in part on other grounds, State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, ¶ 19, 970 P.2d 556, ¶ 19.[2]

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[2] *See also e.g. State v. Bullock*, 272 Mont. 361, 373-84, 901 P.2d 61, 69-76 (1995); *State v. Scheetz*, 286 Mont. 41, 45-51, 950 P.2d 722, 724-28 (1997); *State v. Bassett*, 1999 MT 109, ¶¶ 22-45, 294 Mont. 327, ¶¶ 22-45, 982 P.2d 410, ¶¶ 22-45; *State v. Elison*,

(Continued on following page)

¶ 134 In *Siegal,* we explained that

> while we analyze most search and seizure questions implicating Article II, Section 11 of Montana's Constitution under traditional Fourth Amendment principles enunciated by the federal courts and adopted in our own case law, in certain instances where Montana's constitutional right of privacy, Article II, Section 10, is also specially implicated, we must, of necessity, consider and address the effect of that unique constitutional mandate on the question before us.

Siegal, 281 Mont. at 264-65, 934 P.2d at 184. Similarly, in *Walker,* we reasoned:

> Just as we read the privacy provision of the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans with greater protections from government intrusion, so too do we read the dignity provision of the Montana Constitution together with Article II, Section 22 to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution. The federal constitution does not expressly provide for the right to human dignity.

2000 MT 288, ¶¶ 45-58, 302 Mont. 228, ¶¶ 45-58, 14 P.3d 456, ¶¶ 45-58; *State v. Lovegren,* 2002 MT 153, ¶¶ 18-25, 310 Mont. 358, ¶¶ 18-25, 51 P.3d 471, ¶¶ 18-25; *State v. Tackitt,* 2003 MT 81, ¶¶ 17-31, 315 Mont. 59, ¶¶ 17-31, 67 P.3d 295, ¶¶ 17-31.

Walker, ¶ 73. We thus have recognized that while traditional principles enunciated by the federal courts and adopted in our own caselaw may inform our analysis, our decision must ultimately take account of the unique structure of the Montana Constitution and, in particular, the coordinate, overlapping, and redundant guarantees of Article II.

¶ 135 In the present case, therefore, the fundamental right to just compensation to the full extent of the loss for a taking or damaging of private property must be interpreted mindful of other pertinent rights in the Montana Constitution. One such right is the "inalienable" right of "acquiring, possessing and protecting property." Mont. Const. art. II, § 3. In *City of Bozeman v. Vaniman,* 264 Mont. 76, 869 P.2d 790 (1994), we observed that "[p]rivate real property ownership is a fundamental right, Art. II, § 3, Mont. Const., and any statute which allows the government to take a person's property must be given its plain interpretation, favoring the person's fundamental rights." *Vaniman,* 264 Mont. at 79, 869 P.2d at 792. We reaffirmed this principle in *McCabe Petroleum Corp. v. Easement and Right-of-Way,* 2004 MT 73, 320 Mont. 384, 87 P.3d 479, stating that "because eminent domain interferes with the fundamental right of private ownership of real property, any statute which allows a condemnor to take a person's property must be strictly construed, giving the statute its plain interpretation, but favoring the person's fundamental rights." *McCabe,* ¶ 28 (citing *Vaniman,* 264 Mont. at 79, 869 P.2d at 792). Although

these two cases refer to "real property," we have never excluded other types of property – e.g., personal, intangible, and intellectual – from the principle that "any statute which allows a condemnor to take a person's property must be strictly construed, giving the statute its plain interpretation, but favoring the person's fundamental rights." Indeed, there is no basis in the constitutional text for limiting this principle to "real property," given that Article II, Section 3 recognizes the inalienable right to acquire, possess, and protect "property," not just "real property."

¶ 136 With this general approach in mind, I turn to the questions of whether the Ranchers possess constitutionally protected property interests and whether a part or a whole of those interests has been taken or damaged for public use.

2. Whether the Ranchers Possess Constitutionally Protected Property Interests

¶ 137 The Constitution protects, but does not create, property interests. *Seven Up Pete,* ¶ 26; *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 164, 118 S.Ct. 1925, 1930, 141 L.Ed.2d 174 (1998). Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Monsanto,* 467 U.S. at 1001, 104 S.Ct. at 2872 (internal quotation marks omitted); *accord Seven Up Pete,* ¶ 26; *Germann,* ¶ 27. Critically,

the term "property," as used in Article II, Section 29, contains only one qualifier: "[p]rivate." It is not otherwise restricted to any particular type of property. Rather, by its terms, the constitutional requirement of just compensation applies broadly to "[p]rivate property."

¶ 138 Notably, the term "private property," as used in the Fifth Amendment's Takings Clause, encompasses a wide variety of interests. It includes real property, personal property, and intangible property. *Huntleigh,* 525 F.3d at 1377-78. It also "'denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.'" *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82 n. 6, 100 S.Ct. 2035, 2041 n. 6, 64 L.Ed.2d 741 (1980) (brackets in *PruneYard*) (quoting *United States v. General Motors Corp.,* 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945)). Property interests "are about as diverse as the human mind can conceive," *Florida Rock Industries v. United States,* 18 F.3d 1560, 1572 n. 32 (Fed.Cir.1994), and the Takings Clause is addressed to "every sort of interest the citizen may possess," *General Motors,* 323 U.S. at 378, 65 S.Ct. at 359.

¶ 139 The premise underlying these open-ended definitions of "property" is that the term is not frozen in time to the conceptions of "property" existing in 1791, but rather takes its meaning from contemporary understandings. Indeed, the Supreme Court has stated as much. *See e.g. Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030, 112 S.Ct. 2886,

2901, 120 L.Ed.2d 798 (1992) (noting the Supreme Court's "traditional resort to '*existing* rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments" (emphasis added)). There is no reason to construe the term "property" in Article II, Section 29 differently. Nothing in the text or history of this provision and its predecessor (Article III, Section 14 of the 1889 Constitution) suggests that the meaning of "property" and the rights associated with ownership are limited to the conceptions existing in 1889 or 1972. To the contrary, given that the term is only qualified by the word "private," the reasonable conclusion is that "property" in Article II, Section 29 (as in the Fifth Amendment) takes its meaning from contemporary understandings.

¶ 140 The Montana Code defines "property" broadly. It is not simply land, a fence, a car, or some office furniture. It is anything that a person has the right to possess and use to the exclusion of others. Section 70-1-101, MCA. By way of example, property interests exist in "all inanimate things which are capable of appropriation or of manual delivery," "all domestic animals," "all obligations," "such products of labor or skill as the composition of an author, the goodwill of a business, trademarks, and signs," and "rights created or granted by statute." Section 70-1-104, MCA. Nothing in Montana property law, however, suggests that the meaning of "property"

depends on arbitrarily drawn lines or rigidly constrictive tests devised by the federal courts. The Court's adoption of such tests in *Kafka* (*see Kafka Opinion,* ¶ 46) – thereby restricting the definition of "property" under Article II, Section 29 to those interests which satisfy the standards created by courts of some other jurisdiction not accountable to Montanans – is indefensible.

¶ 141 In the present case, the Ranchers seek just compensation for the taking or damaging of several property interests: "their alternative livestock business, inventory, and equipment," which includes "fixtures," "facilities," and the alternative livestock. The State, the Sportsmen, and the Court do not dispute that these are compensable property interests; however, before proceeding to the question of whether a part or a whole of these interests has been taken or damaged for public use, I note the following considerations regarding the Ranchers' businesses. In the same way that the opportunity to pursue employment is a necessary incident to the fundamental right (under Article II, Section 3) to pursue life's basic necessities, *Wadsworth,* 275 Mont. at 299, 911 P.2d at 1172, the opportunity to operate one's business as a going concern is a necessary incident to the fundamental right (also under Article II, Section 3) to acquire, possess, and protect property. Indeed, operating one's business as a going concern is, like employment, the vehicle by which many Montanans pursue life's basic necessities; and the property interests associated with a going

business are, therefore, entitled to the highest level of protection by this Court.

3. Whether a Part or a Whole of the Ranchers' Property Interests has been Taken or Damaged for Public Use

¶ 142 Article II, Section 29 guarantees just compensation to the full extent of the loss where private property has been "taken or damaged for public use." The Ranchers do not contend that the "public use" requirement has not been met; thus, the only question here is whether their property has been "taken or damaged."

¶ 143 The Court is of the view that Article II, Section 29 applies only to eminent domain proceedings and inverse condemnation actions arising out of, or related to, a direct appropriation of property. *See* Opinion, ¶¶ 67-69. The Court asserts that Article II, Section 29 provides no protection whatsoever against property loss or damage occasioned by government regulation. Opinion, ¶ 69. This, of course, moots the difficult question of how far is "too far" under Article II, Section 29. *Cf. Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Apparently now, no regulation ever goes "too far" under the Montana Constitution.

¶ 144 As noted, I strenuously disagree with this emasculation of Article II, Section 29. Tellingly, the Court's corresponding analysis is "as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had been starved to death." Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in *The Collected Works of Abraham Lincoln* vol. 3, 245, 279 (Roy P. Basler ed., Rutgers University Press 1953).

¶ 145 First, the Court misstates that Article II, Section 29 was adopted "verbatim" from the 1889 Constitution.[3] Opinion, ¶ 65. The Court then cites *Less v. City of Butte,* 28 Mont. 27, 72 P. 140 (1903), and *Knight v. City of Billings,* 197 Mont. 165, 642 P.2d 141 (1982), for the proposition that "the 'or damaged' language of the provision has been interpreted to apply to eminent domain proceedings, including inverse condemnation proceedings, where private property is taken or damaged for public use."

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[3] The word "verbatim" means "following the original word for word." *Webster's New World College Dictionary* 1587 (4th ed., Wiley 2002). Article III, Section 14 (1889) states: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." Article II, Section 29 (1972) states (with italics representing language not contained in Article III, Section 14): "Private property shall not be taken or damaged for public use without just compensation *to the full extent of the loss* having been first made to or paid into court for the owner. *In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.*"

Opinion, ¶¶ 65-67. Of course, this proposition does not establish that the "or damaged" language applies *only* to those contexts. Neither *Less* nor *Knight* involved a regulation of property, and neither case confined the "or damaged" clause in the way the Court now declares. For that matter, the Court's reliance on *Knight* is highly questionable given our statement that our "holding is limited to the situation here, where a physical taking across the street occurred." *Knight,* 197 Mont. at 174, 642 P.2d at 146. In any event, *Less* and *Knight* simply do not stand for the Court's assertion that Article II, Section 29 does not recognize a taking or damaging of property caused by government regulation.

¶ 146 Next, the Court cites *Customer Co. v. City of Sacramento,* 10 Cal.4th 368, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995), for the proposition that California's "or damaged" clause does not apply beyond the ambit of eminent domain and public improvements. Opinion, ¶ 68. *Customer Co.,* however, did not involve a claim based on government regulation of property. Rather, it involved a claim that just compensation is owed when public employees (e.g., law enforcement officers), in the pursuit of their public duties, cause damage to private property. The court held that the public entities involved may be held liable, if at all, only in a tort action, not an inverse condemnation action. *Customer Co.,* 41 Cal.Rptr.2d 658, 895 P.2d at 901. *Customer Co.* is also inapposite.

¶ 147 Moreover, assuming, as does the Court, that the high courts of sister states may dictate the

meaning of the Montana Constitution, I note that the North Dakota Supreme Court has applied Article I, Section 16 of the North Dakota Constitution to a regulatory taking or damaging claim. *See Wild Rice River Estates, Inc. v. City of Fargo,* 705 N.W.2d 850 (N.D.2005). This provision, like Article II, Section 29, states that "[p]rivate property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner." N.D. Const. art. I, § 16. Notably, the North Dakota Supreme Court has said that this constitutional provision "is broader in some respects than its federal counterpart because the state provision was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable." *Wild Rice,* ¶ 16 (internal quotation marks omitted). Likewise, Article I, Section 16 of the Washington Constitution states that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner." In *Manufactured Housing Communities v. State,* 142 Wash.2d 347, 13 P.3d 183 (2000), the Washington Supreme Court observed that "a regulation" can violate Article I, Section 16 when it "effects a total taking of all economically viable use of one's property," "has resulted in an actual physical invasion upon one's property," "destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other and to dispose of property)," or "[was] employed to enhance the value of publicly held

property." *Manufactured Housing,* 13 P.3d at 187. Similarly, in Alaska,

> Article I, section 18 of the Alaska Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Property owners enjoy broader protection under the Alaska Constitution than under the Fifth Amendment of the United States Constitution.

R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 (Alaska 2001). The Alaska Supreme Court has applied this "broader protection" to government regulations. *See R & Y,* 34 P.3d at 293-96.

¶ 148 The Court evidently overlooks these cases (and perhaps others), accusing this Dissent of not citing "a single case" for the proposition that the "or damaged" language is "intended to provide any greater protections in the regulatory taking context than does the Fifth Amendment to the U.S. Constitution, or that it applies to anything other than the consequential damages to the property of persons affected by a physical condemnation, or similar actions, initiated by the State." Opinion, ¶ 69.

¶ 149 Lastly, the Court turns to the actual language of Article II, Section 29. The Court asserts that neither the 1889 nor the 1972 Constitutions "evince any intent that [the "or damaged" language of Article II, Section 29] apply to regulatory takings or damages resulting therefrom." Opinion, ¶ 69. There are two obvious problems with this assertion. First,

as explained above, the language of Article II, Section 29 must be interpreted so as to give effect to Article II's coordinate, overlapping, and redundant guarantees – a point the Court utterly fails to address. Second, the Court's assertion could also be made about the Fifth Amendment's Takings Clause, which simply states: "nor shall private property be taken for public use, without just compensation." There is no more reason to conclude that this language encompasses regulatory takings than there is to conclude that the pertinent language of Article II, Section 29 ("Private property shall not be taken or damaged for public use without just compensation.") encompasses regulatory takings. Yet, the former does encompass regulatory takings, *see Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), as the Court concedes, *see* Opinion, ¶ 74. If Justice Holmes can perceive in the language of the Fifth Amendment's Takings Clause the notion that "if regulation goes too far it will be recognized as a taking," *Mahon,* 260 U.S. at 415, 43 S.Ct. at 160, we can reasonably conclude that he would perceive the same principle in the language of Article II, Section 29, which is identical in all pertinent respects aside from the additional words "or damaged."

¶ 150 As a final point, the Court reasons that because Article II, Section 29 states that private property shall not be taken or damaged for public use without just compensation "having been first made to or paid into court for the owner," Article II, Section 29 "obviously" contemplates only a condemnation of

property. Opinion, ¶ 69. I disagree for the simple reason that the Court's interpretation is inconsistent with the "or damaged" clause and leads to an absurd result. The clause relied on by the Court ("having been first made to or paid into court for the owner") requires the State to pay just compensation "to the full extent of the loss" in advance. Certainly, this may be done when the State sets out to "take" property. But it is pure folly to suggest that the State may do the same with respect to "damaging" property. How could it possibly be known, in advance, all of the properties that will be damaged during the course of a public works project and what "the full extent of the loss" will be? "Obviously," it cannot be known. The Court creates an absurd result by applying the advance-payment clause to the damaging clause. *Cf. In re Marriage of McMichael,* 2006 MT 237, ¶ 14, 333 Mont. 517, ¶ 14, 143 P.3d 439, ¶ 14 ("We interpret a statute to give effect to its purpose and to avoid absurd results.").

¶ 151 In sum, there is nothing in the text of Article II, Section 29 limiting its applicability in the way the Court does today. Article II, Section 29 states:

> Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the

court when the private property owner prevails.

If the State passes a regulation permitting a telecommunications company to run a fiber optic cable through private lands, there is no textual basis for concluding that the property owners cannot prevail under Article II, Section 29 on a claim that their property has been "taken or damaged." *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). If the State passes a regulation completely depriving a property owner of all economically beneficial use of her property, there is no textual basis for concluding that the property owner cannot prevail under Article II, Section 29 on a claim that her property has been "taken or damaged." *Cf. Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). If the State passes a regulation destroying one or more of the fundamental attributes of ownership, there is no textual basis for concluding that the property owner cannot prevail under Article II, Section 29 on a claim that her property has been "taken or damaged." *Cf. Manufactured Housing Communities v. State,* 142 Wash.2d 347, 13 P.3d 183, 187 (2000).

¶ 152 The Court's contrary interpretation, limiting the reach of Article II, Section 29 to direct appropriations, amounts to the improper insertion of language into the provision. *Cf.* § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in

substance contained therein, not to insert what has been omitted or to omit what has been inserted."). Article II, Section 29 does not in any way describe, define, or circumscribe the ways in which private property may be "taken or damaged." It simply states, "Private property shall not be taken or damaged for public use. . . ." Clearly, property is "taken" for public use in an eminent domain proceeding. Property may also be "damaged" as a result of a public works project. But I reject the Court's assertion that property cannot be "taken or damaged" for public use by government regulation. Nothing in the text of Article II, Section 29 requires such a construction. In fact, given that the Fifth Amendment's Takings Clause reaches regulatory takings, and given that Article II, Section 29 is facially broader than the Fifth Amendment, the logical conclusion is that Article II, Section 29 also reaches regulatory takings (and damagings).

¶ 153 The notion of construing Article II, Section 29 more broadly than its federal counterpart is well-established. In *Less v. City of Butte,* 28 Mont. 27, 72 P. 140 (1903), this Court stated:

> Constitutions which provide that "private property shall not be *taken* for public use without just compensation" are but declaratory of the common law, and contemplate the physical taking of property only. Under constitutions which provide that property shall not be "taken or damaged" it is universally held that "it is not necessary that

> there be any physical invasion of the individual's property for public use to entitle him to compensation."

Less, 28 Mont. at 32, 72 P. at 141. The Less Court's restrictive interpretation of the Fifth Amendment's Takings Clause as contemplating only a "physical taking" is clearly no longer valid. *See e.g. Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (recognizing regulatory takings under the Fifth Amendment). That, however, is not the point. Rather, the point is that the damaging clause was intended, from its inception, to provide a broader range of protection than the Fifth Amendment, as interpreted in extant jurisprudence, provides. It is untenable to suggest, as the Court does today, that while the reach of the Fifth Amendment's Takings Clause (ratified in 1791) grew broader over time to accommodate changing needs, the reach of Article III, Section 14 (1889) and, subsequently, Article II, Section 29 (1972) remained frozen in time.

¶ 154 In support of this originalist approach to constitutional interpretation, the Court relies on the fact that the delegates' discussion of Article II, Section 29 during the 1972 Constitutional Convention centered primarily on taking property for highway purposes. Opinion, ¶ 67. This discussion, however, is inapposite. The delegates were considering a motion by Delegate Davis to strike the clause "having been first made to or paid into court for the owner." *See* Montana Constitutional Convention, Verbatim

Transcript, March 9, 1972, pp. 1826-27. (Notably, Delegate Davis pointed out that "I don't think that you can make a determination of what the full extent of the loss is until after the construction takes place." Verbatim Transcript, p. 1826.) But the delegates did not even discuss government regulation of property, let alone express the view that Article II, Section 29 should not apply to government regulations. Their discussion, therefore, does not lend one shred of support to the Court's proposition that Article II, Section 29 does not apply to regulatory cases.

¶ 155 In this connection, the Convention transcripts read as a whole support the contrary view that Montana property owners are protected against uncompensated regulatory infringements on their property rights. One cannot read the transcripts of the debates without recognizing that Montana's Constitution is a progressive constitution. The delegates wrote into our Constitution fundamental rights – protections, really – to protect citizens from the government's inexorable reach into their lives and property. Article II, Section 3 is an apt example. It guarantees to every person "certain inalienable rights," including "the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Recognition of many of these rights as inalienable is unique to Montana's Constitution.

¶ 156 Article II, Section 4 recognizes – again, uniquely – that the "dignity" of the human being is "inviolable." This section also requires the government to treat persons equally under the law, and it prohibits discrimination. Article II, Section 7 states, more broadly than the First Amendment, that every person "shall be free to speak or publish whatever he will on any subject." Article II, Sections 8 and 9 guarantee the public's right to participate in governmental decision-making and the right of each person to examine documents and observe the deliberations of all public bodies and agencies. Neither of these rights is protected by the federal constitution.

¶ 157 The Montana Constitution, unlike its federal counterpart, explicitly protects the right of individual privacy at Article II, Section 10. Montanans enjoy a broader protection of the right to bear arms under Article II, Section 12 than they do under the Second Amendment. The right to vote is explicitly and broadly protected by Article II, Section 13. Article II, Section 15 grants persons under the age of 18 all of the fundamental rights in Article II – a guarantee not contained in the federal constitution. Article II, Section 16 requires that every person have access to the courts and a speedy remedy for every injury of person, property, or character.

¶ 158 Article II, Section 18 declares that the State and its governmental subdivisions are subject to suit (i.e., that sovereign immunity is abrogated) except as specifically provided by law. Article II,

Section 19 states that the privilege of habeas corpus shall "never" be suspended – a right not provided by the federal constitution. Certain clauses of Article II, Sections 23, 24, 25, and 26 provide guarantees to a greater extent than like provisions of the federal constitution. And Article II, Section 29 is textually broader than the Fifth Amendment's Takings Clause.

¶ 159 The delegates intended the Declaration of Rights "'to stand on its own footing and . . . provide individuals with fundamental rights and protections far broader than those available through the federal system'" in order "'to meet the changing circumstances of contemporary life.'" *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, ¶ 94, 58 P.3d 128, ¶ 94 (Nelson & Trieweiler, specially concurring) (citation omitted). This intent to give the Declaration of Rights "teeth" could not be more apparent than in the delegates' adoption of another fundamental right, Article II, Section 34. Although this provision guarantees unenumerated rights, and Article II, Section 29's protections are enumerated, the intention of the Bill of Rights Committee is still pertinent. The Committee considered Section 34 to be "a crucial part of any effort to revitalize the state government's approach to civil liberties questions" and "the source of innovative judicial activity in the civil liberties field." Montana Constitutional Convention, Comments on the Bill of Rights Committee Proposal, February 22, 1972, p. 645.

¶ 160 Yet, against this backdrop of broader fundamental rights, the Court today eviscerates the

protections of Article II, Section 29 by declaring this section to provide no more protection than does the Fifth Amendment. Opinion, ¶¶ 69, 74. To make matters worse, the Court chooses to march lockstep with the confused muddle of Fifth Amendment jurisprudence.[4] I simply cannot abide the Court's decision. It ignores the plain language of Article II, Section 29. It ignores the interconnectedness of the Article II rights – in particular here, the right to acquire, possess, and protect property (Article II, Section 3) and the right to just compensation for a

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[4] Federal regulatory takings jurisprudence has been described as a "doctrinal muddle" lacking "theoretical coherence," Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 Minn. L.Rev. 826, 827, 828 (2006), "a confused body of law containing contradictory principles and standards," John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion,* 17 Vt. L.Rev. 695, 696 (1993), a composite of "ad hoc determinations rather than principled resolutions," Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle,* 57 S. Cal. L.Rev. 561, 562 (1984), and an area of law whose "predominant characteristic" is "a welter of confusing and apparently incompatible results," Joseph L. Sax, *Takings and the Police Power,* 74 Yale L.J. 36 (1964). It has been said that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [the Supreme Court's] takings jurisprudence." *Nollan v. California Coastal Com'n,* 483 U.S. 825, 866, 107 S.Ct. 3141, 3164, 97 L.Ed.2d 677 (1987) (Stevens & Blackmun, JJ., dissenting). The Supreme Court itself has acknowledged that its regulatory takings jurisprudence "cannot be characterized as unified." *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082. *See also Kafka Dissent,* ¶¶ 148-151 (discussing the conflation of takings and substantive due process principles).

taking or damaging of that property (Article II, Section 29). It ignores the broad property rights statutorily defined in §§ 70-1-101 and -104, MCA. And it ignores the overriding theme and fabric of the Declaration of Rights: to protect the fundamental rights of Montanans irrespective of how those rights may be interpreted under like provisions of the federal constitution and to "revitalize" the government's approach to civil liberties.

¶ 161 Long ago, when Montana first joined the Union, the citizens of this state were unwilling to leave their property rights to the whims of the property-related provisions of the federal constitution and the Supreme Court's interpretations of those provisions. Rather, they included in our Constitution an explicit assurance that private property would not be taken or damaged for public use without just compensation. Mont. Const. art. III, § 14 (1889). This provision was carried forward into the 1972 Montana Constitution, with the additional requirement that compensation be provided "to the full extent of the loss" – language which clarifies unequivocally that whether property was taken or damaged depends not on what the government got, but on what the property owner lost. Mont. Const. art. II, § 29 (1972).

¶ 162 It is this Court's responsibility – indeed, its obligation – to acknowledge Article II, Section 29 as the free-standing provision it is and not relegate it to the status of a mere constitutional redundancy. We previously recognized this obligation in *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 P. 993 (1922), when

we refused to ignore our own Constitution and simply adopt the Supreme Court's holding in a closely related case:

> Were we content to accept the views expressed by the Supreme Court of the United States as the rule of property rights in this state, our task in determining the questions presented would be comparatively easy. However, the danger of establishing such a principle in this state is apparent, and although we entertain the very highest regard and respect for the decisions of the Supreme Court of the United States, we do not feel constrained to follow blindly its determinations affecting the rights of our citizens, especially in view of our own constitutional guaranties. . . .
>
> . . .
>
> Since the constitutionality of the act is attacked, both under the federal and state Constitution, we believe it to be our duty, irrespective of the holdings of other courts, to consider and apply the provisions of our own Constitution and general statutes thereto, and declare the rule of property for Montana.

Gas Products, 63 Mont. at 380-81, 388, 207 P. at 994, 996-97.

¶ 163 Thus, some 86 years ago, this Court announced that it would not blindly follow the determinations of the Supreme Court affecting the property rights of our citizens, and we acknowledged

our duty, irrespective of the holdings of other courts, to declare the rule of property for Montana based on the provisions of our own Constitution and general statutes thereto. *Gas Products,* 63 Mont. at 380-81, 388, 207 P. at 994, 996-97. We have utterly failed in recent years to abide by this approach, choosing instead, as the Court does today, to "look[ ] to federal case law for guidance when considering takings claims brought under Article II, Section 29." Opinion, ¶ 63. As a result, the confusion and uncertainty encumbering federal regulatory takings jurisprudence (*see* ¶ 160 n. 4) have infected our own takings jurisprudence. This situation is untenable. It is long past time that we articulate appropriate standards for analysis under Article II, Section 29 and quit allowing federal court decisions to dictate the meaning and substance of Montana's Constitution.

¶ 164 Construing Article II, Section 29 in light of the coordinate guarantees in Article II, I conclude that this provision applies to situations in which property is taken or damaged by virtue of government regulation. I further conclude that this provision affords broader protections than the Fifth Amendment's Takings Clause. Based on these conclusions and the foregoing discussion, I now address whether a part or a whole of the Ranchers' property interests has been taken or damaged, entitling them to just compensation to the full extent of the loss pursuant to Article II, Section 29. Given the impact of I-143 on the alternative livestock industry – outright

obliteration – I consider this to be a relatively easy question to answer.

¶ 165 I-143 forced the Ranchers out of business, as it was intended to do. Consequently, the goodwill and going-concern value of the Ranchers' businesses have been totally destroyed. *See Kafka Dissent,* ¶¶ 197-211. In this respect, I143's effect is dramatic. For all intents and purposes, the Ranchers have been "ousted" from their domain vis-à-vis the goodwill and going-concern value of their businesses. *Cf. Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082 ("Each [of our regulatory takings inquiries] aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."). I would hold that this constitutes not merely a damaging of their businesses, but an outright taking of them.

¶ 166 The Court reasons that "businesses themselves cannot be taken unless the government physically condemns those businesses and runs them itself." Opinion, ¶ 89 (citing *Kafka,* ¶¶ 55-63). This reasoning is lifted, almost verbatim, from the Sportsmen's appellate brief, where they argue:

> The cases in which courts have determined whether "businesses" were even compensable property involve physical appropriation of the property with governmental intent to itself take over the operation of the business it appropriated. *See Kimball Laundry Co. v. United States,* 335 [338] U.S. 1, 12[, 68 S.Ct.

> 1375, 92 L.Ed. 1787] (1949); *United States v. 0.88 Acres,* 760 F.Supp. 210 (W.D. Mich.1987). . . .
>
> The *0.88 Acres* court was emphatic that even where the business property was physically appropriated, "damages for the loss of goodwill or loss of the going-concern value of a business are not compensable unless the government has condemned the business property with the intention of carrying on the business." *Id.* emphasis added; *See also Kimball Laundry,* 335 [338] U.S. at 12[, 68 S.Ct. 1375] (where the government appropriated a laundry and ran it as a laundry during World War II, compensation for the business was appropriate).

As I explained in *Kafka,* however, this interpretation of *Kimball Laundry* is erroneous. *See Kafka Dissent,* ¶¶ 213-214. Moreover, it is illogical. The rule which the Court and the Sportsmen have completely distorted is that when a business is unable to transfer its goodwill and going-concern value to another location (e.g., because the government has taken over the business, or because transfer is prohibited), then compensation is required. *See Kafka Dissent,* ¶¶ 208-210.

¶ 167 As for the Ranchers' inventory, equipment, fixtures, and facilities – most of which were procured and designed for the specific purpose of alternative livestock ranching and, thus, have little or no salvage value – I would hold that the Ranchers are entitled to just compensation for a damaging of property. Likewise, the Court points out that the Ranchers'

alternative livestock lost roughly 95% of its value as a result of I-143. *See* Opinion, ¶ 90 n. 6. Even if the Ranchers have not been deprived of "all" economically viable use of the livestock – a questionable proposition, which the Court asserts in ¶ 80 – I would hold that they are entitled to compensation "to the full extent of the loss," i.e., for the 95% devaluation. Mont. Const. art. II, § 29.

¶ 168 In rejecting the Ranchers' claim with respect to their alternative livestock, the Court asserts that although the Ranchers' herds were disease free, the Ranchers "knew that their alternative livestock carried with them an inherent danger of spreading CWD which could never be eliminated and which could prove uncontrollable if it made its way into the genetic make-up of the native wildlife populations." Opinion, ¶ 98. The Court thus concludes that any investment-backed expectations the Ranchers had in their alternative livestock were unreasonable.

¶ 169 The irony in the Court's reasoning, which the Ranchers point out in their briefs, is that they would have been better off (as it turns out) if their alternative livestock had contracted CWD. *See* 9 C.F.R. § 55.2 ("The Administrator is authorized to pay for the purchase and destruction of CWD positive animals, CWD exposed animals, and CWD suspect animals."). In other words, what the Court fails to recognize is that if the Ranchers should have known that their livestock could contract CWD, thus necessitating destruction, then they had investment-backed expectations in receiving at least *something*

for the livestock. As it is, however, they are receiving nothing because their herds are healthy. That point aside, to the extent Article II, Section 29 requires us to consider the Ranchers' investment-backed expectations, I do not agree with the Court that those expectations were unreasonable. *See Kafka Dissent*, ¶¶ 230-238.

¶ 170 The Court criticizes my analysis as failing to explain how Article II, Section 29 would apply in less-dramatic instances of government regulation of property. Opinion, ¶ 71. It is not necessary, however, to articulate a rule applicable to all possible cases. As the Supreme Court has stated, most regulatory takings require a case-by-case approach. In any event, we cannot refuse to find a taking or damaging of property under Article II, Section 29 on the ground that there may be borderline cases in which we will have to engage in a more complex balancing analysis. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868 (1982) ("[T]his Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis."). The Court's criticism is also incongruous, given that the Court refuses to develop any jurisprudence under Article II, Section 29, choosing instead to eviscerate the provision and march lockstep with the federal courts' pronouncements under the Fifth Amendment. Nevertheless, I note that we purported to adopt and apply a test in

Knight v. City of Billings, 197 Mont. 165, 642 P.2d 141 (1982), for determining when property has been damaged: "'whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.'" *See Knight,* 197 Mont. at 173, 642 P.2d at 145 (quoting *Batten v. United States,* 306 F.2d 580, 587 (10th Cir.1962) (Murrah, C.J., dissenting)).

¶ 171 Here, as discussed earlier in this Dissent, the Sportsmen "represent the voices of thousands of Montana men and women who believe I-143 is vital to the protection of Montana's wildlife and to the tradition of fair chase hunting." According to the Sportsmen, "I-143 was designed and enacted to address very serious dangers to Montana's wildlife and fair chase hunting heritage." Based on the principle that the State may not force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole, I would hold that the costs of achieving the Sportsmen's goals for all Montanans must be borne by the public, not disproportionately placed on the shoulders of the alternative livestock ranchers.

IV. CONCLUSION

¶ 172 In conclusion, I disagree with the Court's analysis of the Ranchers' claims under the Fifth

Amendment for the reasons stated in my *Kafka* dissent. I also disagree with the Court's analysis of the Ranchers' claims under Article II, Section 29 for the reasons set forth above.

¶ 173 As to the latter, I am flabbergasted that this Court, by means of a cramped originalist approach, holds that the rights and protections afforded by the Montana Constitution's textually distinct and broader eminent domain provision are *less* protective than those afforded by the federal constitution. This holding not only flies in the face of the plain language of Article II, Section 29, but also flouts this Court's heretofore dedication to interpret the coordinate, overlapping, and redundant guarantees of the Declaration of Rights together so as to give effect not only to the letter of the constitutional language, but also to the spirit of Montana's highest law.

¶ 174 Though federal jurisprudence may dictate the minimum protections of property rights, Article II, Section 29 constitutes a separate and enforceable constitutional right. Creating a body of law grounded in Article II, Section 29 is necessitated not only by its broader language and its inclusion in the Declaration of Rights, but also by the fact that federal caselaw contains doctrines and precedents that are antithetical to Montanans' property interests – the most notable of which, in recent memory, is *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), a case clearly of concern to Montanans as evidenced by the legislative responses

thereto. *See* Laws of Montana, 2007, Ch. 512 (amending various statutes to provide that private property may not be acquired by eminent domain for the purpose of increasing tax revenue).

¶ 175 It is said that hard cases make bad law. This case proves the rule. In "carefully crafting" I-143 to end-run the just-compensation requirement of Article II, Section 29, the Sportsmen sold the Initiative to 204,282 Montana voters in a classic bait and switch: promote one product with the ulterior goal of selling something entirely different. Wrapped in the hyperbole of "ethical fair chase hunting" and protecting Montana's feral ungulates from disease, hybridization, and privatization, the Sportsmen depicted the alternative livestock ranchers as bad people conducting an offensive business injurious to these higher principles. Yet, the Sportsmen's intent with I-143 was not to address the concerns argued to the voters. Rather, it was to drive a subjectively reprehensible industry out of existence by denying the businesses in that industry the ability to charge for their principle service.

¶ 176 While it is important to acknowledge I-143 as the patent fraud that it was, this, of course, is not the critical issue here. Likewise, for the State to concede that it promoted and enabled the alternative livestock industry for some 83 years prior to the passage of I143, but in the next breath condemn the industry as an offensive and harmful public nuisance in which the Ranchers had no compensable property interests, is hypocrisy of the highest magnitude. Yet,

that too is water over the dam. Rather, the point to be made in this case and in *Kafka* is that if the voters want to vote an "offensive" industry out of existence, so be it. But they need to understand (as they did not here) that there is cost to doing so, and Article II, Section 29 guarantees payment regardless of whether the business owners are perceived as bad people. In other words, the voters must understand that there is fundamental constitutional principle at stake: If the public, through its government, takes or damages a person's private property for the public's use or perceived benefit, then the public, through its taxpayers, must pay just compensation to that person.

¶ 177 No doubt the Court's decision here and in *Kafka* will be hailed as the final nail in the alternative livestock ranchers' coffin. Unfortunately, while the Court has provided the coup de grâce to what a majority of the voters perceived as a noxious and offensive industry, the fallout from these two decisions will not be so limited. This Court has now cabined the scope of Article II, Section 29 beyond its historical underpinnings and its plain language. In so doing, the Court has diminished the right of Montanans under Article II, Section 3 to acquire, possess, and protect property. The Court has also reinforced the government's inexorable reach into other Montana businesses.

¶ 178 Worse still, our decisions will encourage other groups to promote and sell similar bait-and-switch initiatives which, if "carefully crafted," may

effectively nullify other fundamental rights. This result is abhorrent. Today, it is the right to be paid just compensation when the State takes or damages private property. But given the Court's decision to ratify I-143's blatant attempt to end-run this right, all of the other Article II rights are equally at risk. The result this Court has achieved in this case and in *Kafka* is not worth the ultimate cost to Montana's Constitution.

¶ 179 I dissent.

Judge WM. NELS SWANDAL, sitting for Justice BRIAN MORRIS, joins the Dissent of Justice JAMES C. NELSON.

Judge WM. NELS SWANDAL, dissenting.

¶ 180 I concur with Justice Nelson's dissent. Because of the majority's circuitous reasoning, its disdain for private property rights, its endorsement of unprincipled and unfettered government action, which will result in the total loss of value, without compensation, of some of the property at issue, and its disavowal of the plain language of the Montana Constitution, I offer additional comments. Justice Nelson exhaustively discussed the applicable law, and I will not repeat that here. I would find that a taking occurred under both the Fifth Amendment to the United States Constitution and Article II, Section 29 of the Montana Constitution in this case and in *Kafka*

v. Montana Dept. of Fish, Wildlife and Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8.

¶ 181 In 1972, the distinction between real property and personal property was well known to the constitutional conventioneers. Article II, Section 29 says, "Private property shall not be taken or damaged for public use without just compensation. . . ." It does not say "real property" or "land." It does not exclude businesses and all their accoutrements. It does not say that a physical invasion has to occur for damage or a taking to occur. The 1972 Constitutional Convention left the language from the 1889 Constitution intact, foreclosing the possibility of a lockstep march with the federal government. The majority can offer no textual basis in the Montana Constitution for providing less protection to personal, business, and intangible property than for real property. Private property is private property.

¶ 182 The majority does claim that it is just too hard to determine damages in certain types of property. Apparently, trial judges will no longer be burdened with giving the instruction that simply because damages are hard to determine does not mean that none exist and should not be awarded. The majority also apparently believes that juries are not capable of weighing factual issues in takings cases. Thomas Jefferson said, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its

constitution."[5] His statement was prescient. In this case, the majority has denied appellants the opportunity to prove their damages to a jury and has sanctioned a governmental violation of constitutional principles.

¶ 183 There is no justification under the Montana Constitution for a different set of rules for regulatory takings versus an actual occupation of property. The State, when it takes property of any kind, should pay; the more it takes the more it should pay. The takings provision in the Montana Constitution prevents abuse by the State of its eminent domain power and provides protection for private property rights. Freedom and prosperity suffer without such protections. Unfortunately for all citizens of Montana, this Court has ignored its obligations and has abandoned any effort to match the benefits to the State of this taking with the burden imposed on the businesses.

¶ 184 For that matter, it is legitimate to ask what benefit was received. The State, in its argument, asserted that this was a legitimate exercise of the State's "police power," a term often used in constitutional discourse but a term that does not appear in the constitution. As written and passed, I-143 did not benefit the State. The State claims that some people in Montana were offended by fee

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[5] *The Writings of Thomas Jefferson*, vol. 3, 71 (Washington ed. 1861) (Letter to Thomas Paine, July 11, 1789).

hunting. Yet, it is remarkable that their only concern was the exchange of money, not the killing. In reviewing the Montana Constitution, I did not find a constitutional right not to be offended. It must be there because it is the only hook the majority can hang their hat on as suggesting a benefit. I-143 did not ban the existence of elk farms; it did not ban the shooting of elk within an elk farm; it did not change the amount of regulation; it did nothing to control disease or lessen contact between captive and wild animals; and it did nothing to preserve the State's hunting heritage.

¶ 185 What I-143 did was prohibit fee hunting. It completely destroyed the value of the businesses, which includes the license and other intangible assets, and about 90% of the value of the livestock. This is after, as aptly described by Justice Nelson, the State facilitated and encouraged elk farms and the spending of hundreds of thousands of dollars in specialized capital expenditures. Considering that game farms had been sanctioned in this state for over 80 years, to claim now that these appellants had no reasonable expectation they would be allowed to operate their businesses for profit is offensive to any modicum of common sense. Apparently, the power to regulate, in the majority's view, equals the power to destroy. I do not believe this is what the constitutional conventioneers had in mind.

¶ 186 It is disturbing that this Court did not attempt to balance costs and benefits. The appellants in this case and in *Kafka* lost millions of dollars so

some people were no longer offended. The rule from this Court: The State wins and pays nothing as long as there is a hint of benefit to the State, even if the private property owner suffers pounds of burden. Justice Holmes was worried about the use of the police power as justification when he stated: "The protection of private property in the Fifth Amendment . . . provides that it shall not be taken . . . without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). Today's majority opinion is the type of decision he was concerned about and leads to the inescapable conclusion that, in Montana, actual benefit does not have to occur before fundamental rights are destroyed.

¶ 187 The Sportsmen's and the majority's assertions that I-143 served "weighty" and "vital" purposes is laughable. I-143 did not directly address any of the concerns that led to its passage. It was deceptive and a charade by design-deception and fraud embraced by this Court.

¶ 188 Ayn Rand correctly observed that the right to life is the source of all rights – and the right to property is their only implementation. Without property rights, no other rights are possible. These principles are embodied in the Montana Constitution in Article II, Sections 3 and 29. I invite the majority

to read them. The fundamental rights to acquire, possess, and protect property are not even given lip service by this Court. Under the majority's opinion, the State suffers no consequences for the exercise of coercive and unreasonable power in destroying these businesses. There is no serious effort to balance benefits and burdens. It may be too early to start asking, "Who is John Galt?"[6] but more decisions like this will seriously impact all private property and business owners in this State.

¶ 189 I strongly dissent from the majority opinion.

Honorable WM. NELS SWANDAL, District Judge sitting for Justice BRIAN MORRIS.

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[6] In Ayn Rand's work *Atlas Shrugged*, the phrase becomes an expression of helplessness and despair at the current state of the novel's fictionalized world.

348 Mont. 80, 201 P.3d 8 (2008)

Supreme Court of Montana.
Kim J. KAFKA and Cindy R. Kafka, Individually and as Husband and Wife; and as members of Diamond K Ranch Enterprises LLC, a Montana Limited Liability Company, Plaintiffs and Appellants,
and
Jack Bridgewater and Myra Bridgewater, Individually and as members of Phantom Bull Elk Ranch LLC, and Jim Bouma and Barbara Bouma, Plaintiff-Intervenors and Appellants,
v.
The MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, and The State of Montana, Defendants and Appellees,
and
Sportsmen for I-143, Montana Wildlife Federation, Defendant-Intervenors and Appellees.
No. 05-146.

Argued Sept. 13, 2006.
Submitted June 20, 2007.
Decided Dec. 31, 2008.
Rehearing Denied Feb. 10, 2009.

Background: Owners/operators of alternative livestock game farms filed action against state, alleging a taking of compensable property interests as result of initiative that prohibited the charging of a fee to shoot alternative livestock. Following a bench trial on issue of whether a taking had occurred, the District Court, Twelfth Judicial District, Hill County,

David G. Rice, P.J., entered judgment against owners/operators. They appealed.

Holdings: The Supreme Court, Patricia O. Cotter, J., held that:

(1) licenses to operate game farms were not compensable property interests under Takings Clauses of Federal and State Constitutions;

(2) intangible business assets in form of goodwill and going-concern value of game farms were not compensable property interests;

(3) owners/operators presented no evidence that initiative had measurable economic impact on their lands and fixtures, precluding the finding of a compensable regulatory taking of real property;

(4) initiative was not a compensable taking of alternative livestock.

Affirmed.

James C. Nelson, J., filed a dissenting opinion in which Jim Rice, J., and Wm. Nels Swandal, District Court Judge, sitting for Brian Morris, J., joined.

For Appellants: John E. Bloomquist (argued), Abigail J. St. Lawrence, Doney Crowley Bloomquist Payne Uda P.C., Helena, Montana.

For Plaintiff-Intervenors and Appellants: Ward E. Taleff, Taleff Law Office, P.C., Great Falls, Montana.

For Appellee: Hon. Mike McGrath, Montana Attorney General, Chris D. Tweeten (argued), Assistant Attorney General, Helena, Montana, Robert N. Lane, Montana Department of Fish, Wildlife and Parks, Helena, Montana.

For Defendant-Intervenors and Appellees: Jack R. Tuholske (argued), Sarah K. McMillan, Tuholske Law Office, P.C., Missoula, Montana.

Justice PATRICIA O. COTTER delivered the Opinion of the Court.

¶ 1 Appellants Kim and Cindy Kafka, Jack and Myra Bridgewater, and Jim and Barbara Bouma appeal an order of the Twelfth Judicial District Court denying their takings claims against the state of Montana and the Department of Fish, Wildlife and Parks (FWP), an agency of the state of Montana. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 Appellants in this case are all owners and operators of alternative livestock game farms (Game Farms) within the state of Montana. To operate a Game Farm, the owner/operator must have a valid alternative Game Farm license (License) issued by FWP. The requirements for the Licenses are found in Title 87, chapter 4, part 4 of the Montana Code

Annotated and are fairly demanding due to the threat posed by chronic wasting disease (CWD).[1] The appellants in this case all obtained their Licenses at varying times throughout the 1990's and have complied with the requirements of part 4 since that time.

¶ 3 Kim and Cindy Kafka (Kafkas) are members of Diamond K Ranch Enterprises, LLC, located in Hill County. In 1996, the Kafkas applied for a License with FWP and entered into a lease for a tract of land on which to operate an alternative livestock breeding operation. After receiving their License, they began operating in March 1997. In 1998, after obtaining a second License, the Kafkas expanded their operations to focus on the fee-shooting of alternative livestock as their primary revenue source. This operation was conducted on an 1100-acre parcel of land roughly twenty miles from the site of the original breeding operation. The Kafkas purchased this land through a series of three transactions, beginning in 1993 and ending with the finalization of a deed in 2003. In addition to purchasing land and going through the License application process, the Kafkas invested several hundred thousand dollars in other start-up costs, including fencing and the acquisition of stock. According to the record, these costs totaled

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[1] "CWD is a fatal disease of the central nervous system of captive and free-ranging mule deer, white-tailed deer, and Rocky Mountain elk." *Hagener v. Wallace*, 2002 MT 109, ¶ 25 n. 1, 309 Mont. 473, ¶ 25 n. 1, 47 P.3d 847, ¶ 25 n. 1.

roughly $463,000. In 1999, the Kafkas reported $11,000 in income from their Game Farm operations on their federal tax returns, with that figure rising significantly during the year 2000.

¶ 4 Jim and Barbara Bouma (Boumas) operate a Game Farm in Teton County. The Boumas began their Game Farm operations in May 1997, by operating a breeder facility which would allow them to market large shooter bulls to other Game Farms which allowed fee-shooting. Like the Kafkas, the Boumas hold Licenses issued by FWP. The Boumas' breeder operation spans three parcels of land, two of which they acquired in 1996 at a price of $55,000 and a third totaling 126.777 acres, which was acquired as part of a larger purchase of 258.067 acres in December 1999 for approximately $325,000. In March 2000, the Boumas sought to expand their operations onto the remaining 129 acres of their parcel. Like the Kafkas, the Boumas made other investments necessary to institute their breeder operation, such as acquiring stock, License-related application costs, and fencing. According to the record, the Boumas never sold significant numbers of alternative livestock and their operation never generated a taxable profit.

¶ 5 Jack and Myra Bridgewater (Bridgewaters) are the owners of the Phantom Bull Elk Ranch, LLC, located in Broadwater County. The Bridgewaters entered into the Game Farm business in 1992, and focused primarily on fee-shooting as the primary source of income, although they had also harvested and marketed antlers from their alternative livestock

for the velvet market. They purchased the property on which their Game Farm operated in 1990 for approximately $415,000. Like the other appellants, the Bridgewaters invested in the infrastructure necessary to operate a Game Farm. Between 1993 and 2000, their Game Farm generated cash flow in excess of $1.1 million dollars, although the Bridgewaters never reported any profit on their tax returns.

¶ 6 As is common among regulatory schemes, the requirements for maintaining a License under part 4 have changed somewhat throughout the years. However, on November 7, 2000, part 4 underwent a radical change as a result of the passage of Initiative Measure No. 143 (I-143) by the citizens of Montana. I-143 amended two very significant subsections of part 4. First, it resulted in the deletion of the existing language in § 87-4-412(2), MCA (1999),[2] which permitted a License holder to transfer his License, and substituted the following: "An alternative livestock ranch license for a specific facility is not transferable." Section 87-4-412(2), MCA (2001). More significant was I-143's effect on § 87-4-414(2), MCA (1999), as indicated below. The pre-I-143 version of the statute is in normal type face, and the I-143 addition to the statute is in bold.

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[2] The pertinent language of these statutes reads as follows: "An alternative livestock ranch license for a specific facility is transferable with the consent of the department." Section 87-4-412(2), MCA (1999).

> (2) The licensee may acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of the alternative livestock and their progeny in any quantity and at any time of year as long as the licensee complies with the requirements of this part, **except that the licensee may not allow the shooting of game animals or alternative livestock, as defined in 87-2-101 or 87-4-406, or of any exotic big game species for a fee or other remuneration on an alternative livestock facility**.

Section 87-4-414(2), MCA (2001) (emphasis added).

¶ 7 Notably, the initiative did not revoke appellants' Licenses, nor did it result in the confiscation of their alternative livestock. Instead, I-143 prohibited Game Farm operators from charging a fee to shoot alternative livestock. This was a significant departure from the previous scheme because some individuals were willing to expend significant amounts of money to shoot alternative livestock within the confines of a Game Farm. By prohibiting fee-shooting, I-143 eliminated the most profitable use of the alternative livestock, and thus the profitability of Game Farms in Montana. At the same time, it did not eliminate all uses of the alternative livestock, as part 4 still permitted Game Farm owners to maintain their herds, harvest the animals for their meat or antlers, or sell them in out-of-state markets where fee-shooting was still legal.

¶ 8 Aside from these small but extremely significant changes, the remainder of part 4 was unaltered by I143's passage. All parties concede that the Game Farm industry was, and still is, a highly regulated industry. Both before and after the passage of I-143, part 4 conditioned the ability of the licensee to breed, harvest, sell, or dispose of alternative livestock upon "compli[ance] with the requirement of this part. . . ." Section 87-4-414(2), MCA. Part 4 also states that FWP reserves the right to revoke a License if the owner/operator "fail[s] to operate an alternative livestock ranch according to the provisions of this part, rules adopted under this part, or stipulations of the alternative livestock ranch license. . . ." Section 87-4-427(1)(a), MCA. Part 4 outlines in detail the reporting, testing, and recording duties incumbent upon a Game Farm operator, details the steps the operator must take to receive a License, and gives FWP broad authority to inspect and quarantine alternative livestock if necessary. Part 4 also requires environmental assessments (EA) of any proposed operations. It places conditions upon the use and disposition of alternative livestock, and further provides that alternative livestock are the private property of the License holder "for which the licensee is responsible as provided by law." Section 87-4-414(1), MCA. Moreover, there are numerous implementing regulations governing the Game Farms which control virtually every aspect of the Game Farm industry. *See* Admin R.M. §§ 32.4.101-1320 (2008).

¶ 9 Because I-143 eliminated the in-state market for fee-shooting and impaired the profitability of their Game Farm operations, the Kafkas challenged the validity of I-143 in District Court. On April 5, 2002, the Kafkas filed suit against the State and FWP, challenging the lawfulness and constitutionality of I-143 on a variety of grounds. On May 8, 2002, appellees-intervenors Sportsmen for I-143 and Montana Wildlife Federation were permitted to intervene, opposing the Kafkas. On October 21, 2002, the District Court dismissed six of the seven counts alleged in the original complaint, none of which are on appeal before this Court. The remaining claim concerned whether the passage and implementation of I-143 resulted in a taking of various property interests held by the Kafkas under Article II, Section 29 of the Montana Constitution and the Fifth Amendment to the U.S. Constitution. The property interests allegedly taken by I-143 included the Kafkas' animals, Licenses, real property, improvements, business, goodwill and livelihoods.

¶ 10 As litigation before the District Court proceeded, the Bridgewaters and Boumas were granted leave to intervene and join the Kafkas in challenging I-143's constitutionality. On February 25, 2003, the District Court bifurcated the legal proceedings and decided the takings claims would be determined separately. If the District Court found a taking had occurred, it would then submit the determination of damages to a jury.

¶ 11 On May 19 and 20, 2004, the District Court held a bench trial on appellants' takings claims under the Montana and U.S. Constitutions. In the course of this trial, the District Court received voluminous testimony and evidence. On February 8, 2005, the District Court issued a detailed and comprehensive order containing seventy-three findings of fact and fifty-one conclusions of law and ultimately denied appellants' takings claims. The District Court held that the enactment and enforcement of I-143 did not amount to a compensable taking of appellants' private property under the Montana or U.S. Constitutions. Judgment was rendered against appellants and they have timely appealed to this Court.

¶ 12 Appellants challenge the District Court's order in several respects. We describe the rationale underlying the order in broad terms to convey a sense of the District Court's reasoning and analysis. First, we turn to the relevant portions of the District Court's findings of fact. The District Court found that all parties knew the Game Farm industry was highly regulated, existing only by virtue of legislative permission, and that the legislature reserved the ability to change the regulations governing Game Farms at all times. The District Court pointed to specific portions of the EA prepared for the Kafkas' operations in which FWP warned them of public unrest regarding Game Farms due to the threat posed by CWD and their negative impact on Montana's fair chase hunting tradition. For instance, in the EA prepared in 1996, FWP specifically noted that "[t]here are many

people who would like to see game farming prohibited in Montana. Some of these people belong to organizations that will probably continue their efforts to have legislation passed to eliminate game farming." In the EA for the Kafkas' second License, FWP noted much public concern on the negative effect that Game Farms have on Montana's hunting heritage and the sport of hunting in Montana. However, FWP also noted that game farms were legitimate, regulated activities, approved by the legislature, and that it had "no authority to regulate game farms based solely on public sentiment." Although there was no evidence that the Boumas or Bridgewaters received these same warnings, the District Court found that they knew, or should have known, about the tentative status of Game Farms in Montana.

¶ 13 The District Court also issued findings concerning the economic effect of I-143 with respect to appellants' property interests. On the one hand, the District Court found appellants' real estate retained significant value in spite of I-143 and that some of appellants' lands had appreciated in value since initially purchased. With respect to the Kafkas, the District Court found that the "highest and best use" of the land associated with their original breeder operation was as "a small tract of range land, with a possible conversion to a rural home site with adjoining pasture." Its value for this use as of November 7, 2000, was $34,720. The second property's "highest and best use" was found to be as "rangeland with recreational influences, used for the production of

livestock and a potential homesite," and its value as of November 7, 2000, was $336,000. Although the Kafkas argued that covenants in the title documents prevented such a use, the District Court was not persuaded by their evidence on this point. The District Court also took notice of the fact that the covenants in question had already been lifted by agreement entered into between the Kafkas and Hill County on March 29, 2004. Further, the District Court rejected expert testimony presented by the Kafkas that the "highest and best use" of their lands was as Game Farms, finding that their expert testimony failed to conform to the standards established under the uniform standards for professional appraisal practice.

¶ 14 With respect to the Bridgewaters' property, the District Court similarly found that its "highest and best use" was as a "recreational ranch," and that the value of the land, improvements, and fixtures was $945,000 as of November 7, 2000. This was an approximately 100% appreciation in the value of the land since initially purchased in 1990. The District Court observed that the Bridgewaters did not provide expert testimony regarding the value of the land and its fixtures, or its highest and best use, and that their expert specifically denied having appraised any of the Bridgewaters' tangible real or personal property.

¶ 15 The District Court found the "highest and best use" of the Boumas' property to be for "agricultural production with the potential for future development for industrial or rural use." Its valuation for

these uses as of November 7, 2000, was $258,000. This represented the value of the two original lots, now worth $87,000, and the third lot worth $171,000. These figures also represented a notable appreciation in the value of the Boumas' lands. Further, the District Court observed that the Boumas, like the Bridgewaters, provided no testimony as to the value of the land, its fixtures, its highest and best use, nor did they provide an expert appraisal of their tangible real or personal property.

¶ 16 The District Court did, however, find that appellants' alternative livestock suffered a substantial loss in value as a result of I-143. As the District Court noted, before I-143, the Kafkas could fetch $5,000 to $6,000 per head of alternative livestock by virtue of fee-shooting. After I-143, each head of livestock was worth only between $1,700 and $1,800 in out-of-state markets. Although there was testimony of even greater devaluations of the livestock of the Boumas and Bridgewaters, the District Court did not refer to these in its order. *See* ¶ 84.

¶ 17 The District Court then issued findings suggesting that this particular economic impact could be mitigated. The District Court noted that there still remained out-of-state markets for alternative livestock, and that appellants could harvest the alternative livestock for their meat and antlers. For instance, the Bridgewaters had been able to sell a herd of 160 of their alternative livestock to an out-of-state concern for approximately $80,000. The District Court also noted that none of the appellants had indicated

any taxable profit on their tax returns, thus implying that their businesses were not profitable to begin with.

¶ 18 Ultimately, the District Court's findings suggest that the Kafkas suffered the greatest economic impact, the Bridgewaters somewhat less, while the Boumas suffered no direct economic impact at all. The District Court tempered these conclusions by observing that all appellants either knew, or should have known, that Game Farms were highly controversial in Montana and that they were obliged to comply with any changes in the governing laws. Further, the District Court found that I-143 served a legitimate state interest, insofar as it promoted Montana's hunting heritage, protected wild game populations from the spread of disease and hybridization, and thus generally protected the sport of hunting in Montana.

¶ 19 In its conclusions of law, the District Court examined each of appellants' property interests separately to determine if they had been taken by I-143. The District Court began by considering whether appellants' Licenses and intangible business assets (i.e., good will and going-concern value) were compensable property interests[3] under the Fifth Amendment

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[3] Throughout this Opinion, the phrase "compensable property interest" refers solely to a property interest which is potentially compensable under the Fifth Amendment or Article II, Section 29. This phrase does not refer to property interests

(Continued on following page)

and Article II, Section 29. After reviewing the pertinent authorities, the District Court concluded that the Licenses were not compensable property interests and therefore could not be "taken." With respect to appellants' intangible business assets, the District Court concluded they were not taken because such interests are not compensable in the regulatory taking context.

¶ 20 The District Court acknowledged that the land, alternative livestock, and other physical assets were compensable property interests, but ultimately found that none of these compensable property interests were taken by I-143. The District Court rejected the argument that appellants had suffered a "categorical taking" under *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), because these items continued to retain economic value, even if greatly diminished; thus, the conditions necessary for applying the *Lucas* analysis were not satisfied.

¶ 21 The District Court then went on to consider whether there was a taking under the factors-based analysis from *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).[4] On the one hand, the District

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that may be entitled to due process protections under the U.S. or Montana Constitutions. *See* ¶ 40.

[4] The *Penn Central* analysis is described in greater detail below at ¶¶ 67-72.

Court failed to see any evidence of an economic impact on appellants' land and fixtures as a result of I-143. In this regard, the District Court noted that appellants failed to provide any expert appraisals to demonstrate the impact of I-143 on their real estate interests. However, the District Court did recognize a significant impact on appellants' alternative livestock. Overall, however, the District Court concluded that any reasonable investment-backed expectations appellants may have had regarding their Game Farms had to be tempered against the reality that they were operating in a highly regulated, controversial field, where the State was free to change the regulatory environment. In short, appellants should have reasonably anticipated that something like I-143 was on the horizon. Additionally, the District Court found that the character of the governmental action embodied in I-143 was a valid exercise of the police power of the State and substantially advanced a number of legitimate state interests. Accordingly, the State had no constitutional duty to compensate appellants for the effects of I-143, no matter how greatly it impaired the profitability of appellants' businesses.

¶ 22 Appellants argue on appeal that several of the District Court's findings were clearly erroneous. The Kafkas, for instance, argue that the District Court improperly relied on tax return information to conclude that their businesses suffered no significant economic impact as a result of I-143. Additionally, they argue that the evidence before the District Court

showed that there was no viable out-of-state market for their alternative livestock or their by-products, and that after I-143 they could only sell these animals at a loss. They also argue the District Court improperly relied upon on the various "highest and best use" appraisals for their parcels of land provided by the State's experts. They further dispute the finding that they should have known that the Montana voters might approve and pass a measure like I-143. The Boumas and Bridgewaters join in these arguments, adding further criticisms of the appraisal methods upon with [sic] the District Court based its findings.

¶ 23 In addition to challenging some of the District Court's factual findings, appellants fault the District Court for concluding that their Licenses and intangible business assets were not compensable property interests. Appellants maintain that the District Court should have concluded these interests were compensable and then analyzed them under the appropriate takings analysis. Additionally, appellants argue that the District Court erred in its takings analysis of its interests in the land and alternative livestock with respect to each of the *Penn Central* factors. They argue that the District Court failed to appreciate the economic impact I-143 had on their businesses and property, relying too much on the fact that appellants failed to report a taxable profit on their tax returns. They also assert that their investment-backed expectations were reasonable, in spite of the fact that they were participating in a highly

regulated field of business. Further, they fault the District Court for placing too much emphasis on whether I-143 was a legitimate exercise of the State's police power, and overlooking the fact that I-143 unfairly forces appellants to bear the economic burden associated with the elimination of Game Farms in Montana.

¶ 24 Appellants urge us to conclude that the District Court erred, and that I-143 effected an unconstitutional taking of their Licenses and tangible and intangible business assets. The State and intervenors maintain the District Court's order was correct in its particulars and urge us to affirm.

ISSUES

¶ 25 We restate the issues on appeal as follows:

¶ 26 **Issue One:** *Did the District Court err in concluding that the enactment and enforcement of I-143 did not amount to a taking of appellants' Licenses and the goodwill and going-concern value of their businesses under the Fifth Amendment and Article II, Section 29 of the Montana Constitution?*

¶ 27 **Issue Two:** *Did the District Court err in concluding that the enactment and enforcement of I-143 did not amount to a taking of appellants' real and tangible personal property under the Fifth Amendment and Article II, Section 29 of the Montana Constitution?*

STANDARD OF REVIEW

¶ 28 We review a district court's conclusions of law to determine whether they are correct. *State v. Fyant,* 2004 MT 298, ¶ 7, 323 Mont. 408, ¶ 7, 104 P.3d 434, ¶ 7. We review findings of fact under the clearly erroneous standard pursuant to M.R. Civ. P. 52(a). We use a three-part test to determine if a finding is clearly erroneous. *Interstate Prod. Credit Assn. v. DeSaye,* 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). First, we examine the record to determine if the findings are supported by substantial evidence. *DeSaye,* 250 Mont. at 323, 820 P.2d at 1287. Second, we consider whether the trial court has misapprehended the effect of the evidence. *DeSaye,* 250 Mont. at 323, 820 P.2d at 1287. Third, if both of these tests are satisfied, we may still conclude that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *DeSaye,* 250 Mont. at 323, 820 P.2d at 1287 (quotation omitted).

DISCUSSION

¶ 29 **Issue One:** *Did the District Court err in concluding that the enactment and enforcement of I-143 did not amount to a taking of appellants' Licenses and the goodwill and going-concern value of their businesses under the Fifth Amendment and Article II, Section 29 of the Montana Constitution?*

¶ 30 The Takings Clause of the United States Constitution provides in pertinent part that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. Article II, Section 29 of the Montana Constitution states that "[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Although the plain language of these provisions differ insofar as Section 29 refers to both "taking" and "damaging" as a basis for just compensation, we have generally looked to federal case law for guidance when considering a takings claim brought under Article II, Section 29. *Western Energy Co. v. Genie Land Co.*, 227 Mont. 74, 77-78, 737 P.2d 478, 480-83 (1987); *Germann v. Stephens*, 2006 MT 130, ¶¶ 27-28, 332 Mont. 303, ¶¶ 27-28, 137 P.3d 545, ¶¶ 27-28. This approach is consistent with that of other jurisdictions which have similar or identical language in their state constitutions.[5] *E.g.*, *San Remo Hotel L.P. v. City and Co. of San Francisco*, 27 Cal.4th 643, 117 Cal.Rptr.2d 269, 41 P.3d 87, 100-101 (2002) (citations and quotations omitted, alterations in original) ("By virtue of including 'damage[ ]' to property as well as its 'tak[ing],' the California

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[5] As an aside, we note that the plain language of Article II, Section 29 is not unique among state constitutions. Roughly half the jurisdictions in the United States have the "or damaged" language in their state constitutions. Julius L. Sackman, *Nichols on Eminent Domain* vol. 2A, § 6.01[12][c], 6-29 (3d ed., Matthew Bender 2008).

clause protects a somewhat broader range of property values than does the corresponding federal provision. But aside from that difference . . . we appear to have construed the clauses congruently.").

¶ 31 In its order, the District Court concluded that appellants had waived any argument they may have had that Article II, Section 29 provides greater protection in the regulatory taking context than the Fifth Amendment. In conclusion of law No. 3, the District Court held that "Plaintiffs have conceded that analysis under the Montana Constitution does not differ from that under the Fifth Amendment. . . ." In their briefing before this Court, appellants have not mounted a challenge to this conclusion. Moreover, appellants rely almost exclusively on federal case law to challenge the District Court's application of the *Penn Central* factors. Because the parties and the District Court have adhered to our previous approach of looking towards federal jurisprudence when considering takings claims under Montana law, we will continue to follow that approach here.

¶ 32 "A takings claim requires a two-step analysis in which a court first determines whether a plaintiff possesses a cognizable property interest in the subject of the alleged taking. The question of whether plaintiffs owned a compensable property interest presents a question of law based on factual underpinnings." *Mohlen v. United States*, 74 Fed.Cl. 656, 660 (Fed.Cl.2006) (quotation omitted). After a compensable property interest has been established "the court decides if the governmental action at issue

constituted a taking of that property." *Mohlen,* 74 Fed.Cl. at 661. As we have stated in a similar context, "[u]nder Montana law, the threshold question of whether one has a protected property interest must . . . be answered in the affirmative before the question of whether one was deprived of that interest may be submitted to the trier of fact." *Seven Up Pete Venture v. State,* 2005 MT 146, ¶ 26, 327 Mont. 306, ¶ 26, 114 P.3d 1009, ¶ 26 (quotation and alterations omitted, ellipsis in original); *accord Maritrans, Inc. v. United States,* 342 F.3d 1344, 1351 (Fed.Cir.2003).

¶ 33 Property interests themselves are not defined by the Takings Clause, or for that matter by Article II, Section 29; "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 815 (1984) (quotation omitted); *accord Germann,* ¶ 27. "These 'background principles' and 'rules and understandings' focus on the nature of the citizen's relationship to the alleged property, such as whether the citizen had the rights to exclude, use, transfer, or dispose of the property." *Members of the Peanut Quota Holders Assn. Inc. v. United States,* 421 F.3d 1323, 1330 (Fed.Cir.2005), *cert. denied* 548 U.S. 904, 126 S.Ct. 2967, 165 L.Ed.2d 951 (2006).

¶ 34 The District Court found that the Licenses were not compensable property interests. The gist of the District Court's reasoning was that the Licenses are more akin to privileges, and not vested property

interests which could be subject to a taking. The District Court noted that this view was generally consistent with prevailing authority. Moreover, the District Court found no case law for the proposition that a taking of a license occurs when a new regulatory requirement, or in this case a regulatory prohibition, "ma[kes] the licensed business less profitable than it had been prior to the new regulations." Further, the District Court observed that "[w]hen state law creates the privilege of holding a license to engage in a heavily regulated business like game farming is in Montana, it need not pay compensation when it changes the conditions under which that privilege may be exercised." Simply put, appellants possess no common law property right to the Licenses, and the State retained the power at all times to revoke or changes [sic] those Licenses if it chose to do so.

¶ 35 Similarly, the District Court found that appellants' intangible business assets (i.e., the goodwill and going-concern value of their Game Farms) were not compensable property interests in the regulatory takings context. The District Court, citing to *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), among others, noted precedent weighed heavily against the notion that loss of future profits, without more, provided a basis for a takings claim. The District Court concluded that appellants cited no case law "for the proposition that loss of future business opportunity is a compensable property interest under the Fifth Amendment." Moreover,

the District Court noted that the ability to operate a Game Farm was not a common law right, and that because this ability was wholly dependent upon legislative permission, the State was not required to pay compensation for any business loss resulting from I-143.

¶ 36 Appellants' challenge these conclusions. Generally speaking, appellants argue that Licenses, goodwill, and going-concern value are property interests recognized under Montana law. As such, they argue it was incorrect for the District Court to simply conclude that they could not be taken as a result of the regulatory change occasioned by I-143. Appellants urge us to reverse the District Court on this point, find these interests were compensable, and then correctly apply the *Penn Central* or *Lucas* takings analysis.

¶ 37 In cases where there is a "mix" of property interests, it is appropriate, if warranted under the circumstances, to consider those interests separately in a takings analysis. *See Conti v. United States,* 291 F.3d 1334, 1340-43 (Fed.Cir.2002), *cert. denied* 537 U.S. 1112, 123 S.Ct. 904, 154 L.Ed.2d 785 (2003); *Maritrans,* 342 F.3d at 1352-53. That was the approach applied by the District Court and we will follow it here. Moreover, it is critical to bear in mind throughout our discussion that appellants bear the burden of proving a taking has occurred. *Mohlen,* 74 Fed.Cl. at 660.

A. Licenses as Compensable Property Interests

¶ 38 Generally speaking, a license is simply a right or privilege granted by a sovereign authority to engage in certain activity. 53 C.J.S. *Licenses* § 2, 441-42 (West 2005); *Members,* 421 F.3d at 1333 (stating that a fishing license "is merely a representation by the government that it will not interfere with the licensee's efforts to catch fish."). "A license is a right granted by some competent authority to do an act which, without such license, would be illegal." *Beard v. City of Atlanta,* 91 Ga.App. 584, 86 S.E.2d 672, 676 (1955). In a similar context, we have stated that "[a] license is a grant by a government authority or agency of the right to engage in conduct that would be improper without such a grant. The conferment of a license . . . is merely a privilege. . . ." *Wallace v. Mont. Dept. of Fish, Wildlife and Parks,* 269 Mont. 364, 368, 889 P.2d 817, 820 (1995) (quotation omitted, ellipsis in original).

¶ 39 At the same time, courts have recognized that some licenses may contain property interests that go beyond their status as a "mere privilege." "[A] license may implicate property interests. A license holder, for example, may acquire a property right protected by the Constitution's Due Process Clause. A professional license may be property for the purposes of equitable distribution. A license may be transferrable and may be worth a substantial sum to its holder." *United States v. Berg,* 710 F.Supp. 434, 437 (E.D.N.Y.1988) (citations and footnote omitted). In *State v. Pyette,* 2007 MT 119, 337 Mont. 265, 159 P.3d

232, for instance, we observed that a state-issued driver's license constitutes a property interest for purposes of due process. *Pyette,* ¶ 13. Similarly, in *United States v. Dicter,* 198 F.3d 1284 (11th Cir.1999), the Eleventh Circuit Court of Appeals found that a medical license was considered "property" for the purposes of a federal drug forfeiture statute, 21 U.S.C. § 853, in reliance upon Georgia case law to the effect that a state-issued license to practice medicine constituted a valuable property right. *Dicter,* 198 F.3d at 1290; *See also Goldberg v. Kelly,* 397 U.S. 254, 262 n. 8, 90 S.Ct. 1011, 1017 n. 8, 25 L.Ed.2d 287 (1970) (discussing increasing tendency in modern society to recognize property rights in government-conferred entitlements and licenses).

¶ 40 However, as the District Court recognized, appellants' arguments generally fail to appreciate the critical distinction between what might be considered property for purposes of due process, and what types of interests are considered compensable under the Fifth Amendment or Article II, Section 29. Appellants have cited cases such as *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and *Wedges/Ledges of Cal., Inc. v. City of Phoenix,* 24 F.3d 56 (9th Cir.1994) which demonstrate that licenses can be property for purposes of due process. But none of these cases are helpful or relevant in this context. "Care . . . must be exercised not to analogize what is 'property' for purposes of the Takings Clause and what might be viewed as a 'property interest' under the Due Process Clause, as the two concepts are

dissimilar." *Arctic King Fisheries, Inc. v. United States,* 59 Fed.Cl. 360, 372 n. 27 (Fed.Cl.2004). Without belaboring the point, suffice it to say that reliance on due process cases to prove a particular property interest is compensable for purposes of a takings analysis is simply misplaced. *See Kizas v. Webster,* 707 F.2d 524, 534-40 (D.C.Cir.1983) (demonstrating that property interests for purposes of due process are not equivalent to compensable interests under the Takings Clause).

¶ 41 Courts which have directly considered the question at bar have taken a dim view of the notion that government-issued licenses are compensable property interests. *See United States v. Fuller,* 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973) (grazing permit not a compensable property interest); *accord Stevens Co. v. United States Dept. of Interior,* 507 F.Supp.2d 1127 (E.D.Wash.2007); *Conti,* 291 F.3d at 1342 (no compensable property interest in a government-issued fishing license); *accord Am. Pelagic Fishing Co., L.P. v. United States,* 379 F.3d 1363, 1374 (Fed.Cir.2004), *cert. denied* 545 U.S. 1139, 125 S.Ct. 2963, 162 L.Ed.2d 887 (2005); *accord Arctic King,* 59 Fed.Cl. at 371; *Hawkeye Commodity Promotions, Inc. v. Vilsack,* 486 F.3d 430, 439-40 (8th Cir.2007) (no compensable property interest in a state-issued license to operate lottery machines). As noted by the District Court, appellants presented no authority under takings jurisprudence to counter this view.

¶ 42 Nevertheless, compensable property interests can exist in government-issued licenses or

permits if they are free from "express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude." *Members,* 421 F.3d at 1331. In *Members,* the Federal Circuit Court of Appeals considered a takings claim brought by members of the Peanut Quota Holders Association, Inc. (Members). The Members had been long-time participants in a government-established program entitling them to receive quotas to grow specific quantities of peanuts. Under the program, the Members were able to lease or sell their quotas to other farmers. One of the significant benefits the Members enjoyed as a result of this arrangement was the ability to secure favorable loan rates.

¶ 43 The Members were initially peanut farmers, but over time they ceased to grow peanuts while retaining their right to sell and lease their peanut quotas. In 2002, Congress changed the peanut quota program, allowing only individuals who actually farmed peanuts to participate. Because the Members lost their ability to receive quotas, they lost the favorable loan rates they had formerly secured. The Members argued that the change in the program, which prevented them from participating in it, constituted a taking of these favorable loan rates. *Members,* 421 F.3d at 1325.

¶ 44 The primary issue before the Court of Appeals was whether the quotas were compensable property interests under the Fifth Amendment. To address this question, the Court of Appeals turned to

the seminal cases in this area for guidance, including *Fuller, Conti, Am. Pelagic,* and *Mitchell Arms, Inc. v. United States,* 7 F.3d 212 (Fed.Cir.1993), *cert. denied* 511 U.S. 1106, 114 S.Ct. 2100, 128 L.Ed.2d 662 (1994).[6] First, the Court noted that "[t]he right to transfer is a traditional hallmark of property" and that the quotas were indeed transferable. *Members,* 421 F.3d at 1332. Then the Court considered whether the quotas gave the Members the "right to exclude," observing that "[t]he Supreme Court has recently recognized that the right to exclude is 'perhaps the most fundamental of all property interests.'" *Members,* 421 F.3d at 1333 (quoting *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539, 125 S.Ct. 2074, 2082, 161 L.Ed.2d 876 (2005)). The Court observed a critical distinction between licenses generally and the quotas before it. The quotas were "considerably more concrete" than, for instance, a license to fish because such a license "is merely a representation by the government that it will not interfere with the licensee's efforts to catch fish." *Members,* 421 F.3d at 1333. In other words,

> [s]o long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive. Neither the fisherman nor the firearms salesman can exclude later

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[6] *Mitchell Arms* is discussed *infra* at ¶ 58.

> licensees from entering the market, increasing competition, and thereby diminishing the value of his license.

Members, 421 F.3d at 1334.

¶ 45 The peanut quotas conferred the "right to exclude" because the quotas themselves "represented a right to plant and produce a certain amount of peanuts at a certain price in specific crop years." *Members,* 421 F.3d at 1334. In other words, the quota program conferred upon "the peanut quota holders . . . an excludable interest, because the peanut quota program isolated their particular interest from competition." *Members,* 421 F.3d at 1334. Ultimately, in spite of the fact that the quotas were compensable property interests, the Court of Appeals found that the government was under no constitutional duty to compensate the Members because neither the statute, nor the surrounding circumstances, indicated that the quotas were irrevocable, and the government always maintained "its right to withdraw those benefits or qualify them as it chooses." *Members,* 421 F.3d at 1335.

¶ 46 As stated in *Members,* to qualify as compensable property interests, the Licenses must be transferable, exclusive, and free of any "express statutory language precluding the formation of a property right. . . ." *Members,* 421 F.3d at 1331. We address each of these requirements in turn, as they apply to the Licenses before us.

¶ 47 With respect to whether the Licenses were transferrable, we note that § 87-4-412(2), MCA (1999), gave the licensee the right to transfer the Licenses subject to FWP approval. According to the statute, FWP did not have broad discretion to deny the transfer assuming the transferee complied with the statutory requirements of part 4. Section 87-4-412(2), MCA (1999). Before the passage of I-143, the Licenses were transferable.

¶ 48 It is arguably a closer question as to whether the Licenses were free of any express statutory language that would prohibit the formation of a compensable property interest in the License itself. Neither part 4 nor the Licenses themselves contain the type of express "disclaimer" language discussed in cases like *Fuller, Conti*, or *Am. Pelagic*. *See Fuller,* 409 U.S. at 489, 93 S.Ct. at 803 (quoting 43 U.S.C. § 315b); *Conti,* 291 F.3d at 1341-42 (citing 16 U.S.C. § 1853(d)(3)(D), (d)(2)(A)); *Am. Pelagic,* 379 F.3d at 1374 (citing 15 C.F.R. § 904.301(a)). In all of those cases, there was language in the enabling regulations or statutes which expressly disclaimed that the licenses or permits themselves created any compensable property interests.

¶ 49 However, part 4 does put the holder on notice that continued compliance with applicable laws and regulations is required for maintenance of the License. *See* ¶ 8. Both versions of part 4 state that the licensee may breed, harvest, sell, or dispose of alternative livestock, so long as she "complies with the requirement of this part." Both versions of part 4

specifically state that FWP may revoke the Licenses if the operator fails "to operate an alternative livestock ranch according to the provisions of this part, rules adopted under this part, or stipulations of the alternative livestock ranch license." Section 87-4-427(1)(a), MCA. Thus, nothing in part 4 limits the ability or discretion of FWP or the State to make changes to the statute. Additionally, the Licenses issued to all appellants stated that they were subject to the "general requirements of the game farm statutes and rules for Montana Fish, Wildlife, & Parks and the Montana Department of Livestock. . . ."

¶ 50 More importantly, nothing in the Licenses or part 4 expressly revokes the ability of the State to alter those Licenses via duly enacted statutory amendments or changes. In this regard, we note the operation of § 1-2-110, MCA, entitled "All statutes subject to repeal," which states: "Any statute may be repealed at any time except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal." Section 1-2-110, MCA. As the District Court correctly held, the ability to operate a Game Farm is not a common law right incident to the ownership of real property, and is legal only by virtue of legislative enactment. "That the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and that neither such animals nor parts thereof are subject to private ownership except in so far as the state may choose to make them so, are principles

now too firmly established to be open to controversy." *Rosenfeld v. Jakways,* 67 Mont. 558, 562, 216 P. 776, 777 (1923). Assuming any statutory amendment is lawful, there is no legal authority which would restrict the State from making amendments to part 4 in the interests of further regulating the Game Farm industry. As the Federal Circuit Court of Appeals stated in *Members,*

> [t]he government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.

Members, 421 F.3d at 1335.

¶ 51 However, even assuming arguendo it is a closer question as to whether part 4 and the Licenses are actually free of express language prohibiting the formation of a compensable property interest, we do not need to resolve that question to conclude the Licenses are not compensable property interests, because they undoubtedly lack the most significant of all the indicia discussed in *Members:* the right to exclude. "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession – the right to *exclude* strangers, or for that matter friends, but especially the Government." *Hendler v. United States,* 952 F.2d 1364, 1374 (Fed.Cir.1991).

¶ 52 Nothing in the language of the Licenses or either version of part 4 gives the License holders the right to exclude others from the Game Farm industry. There was no limit to the number of Licenses which could be issued by FWP, and so the appellants were never given the "right to exclude" by virtue of their Licenses. The License holders in this case received a representation by the State that it would not interfere with their efforts to operate Game Farms, so long as they complied with the requirements of part 4. However, none were assured of freedom from competition, and none of the Licenses conferred upon appellants a discrete segment of the Game Farm industry in Montana.

¶ 53 Moreover, as is conceded by all parties in this case, the Game Farm industry was highly regulated due to concerns over the damaging impact of CWD. *See* ¶¶ 2, 8. As the Federal Circuit noted in *Members,* "when a citizen voluntarily enters into a market subject to pervasive government control, he cannot be said to possess the right to exclude." *Members,* 421 F.3d at 1331. While the appellants certainly had the right to exclude others from fee-shooting on *their* property, that right was not due to the Licenses, but due to their inherent rights in the real property on which those operations were conducted. *See Presley v. City of Charlottesville,* 464 F.3d 480, 492 n. 2 (4th Cir.2006) (stating that "perhaps the most important aspect of real property ownership [is] the right to exclude others from one's property.")

(citing *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)).

¶ 54 Accordingly, because the Licenses did not meet the three required criteria for compensability under *Members,* we conclude the District Court did not err when it held the Licenses were not compensable property interests under the Fifth Amendment of the U.S. Constitution, or Article II, Section 29 of the Montana Constitution.

B. Appellants' Intangible Business Assets

¶ 55 We turn now to the District Court's conclusion that I-143 did not take appellants' intangible business assets. We start with the proposition that intangible assets are statutorily recognized forms of property in Montana, and possess the indicia of property which the Licenses do not. *See* Section 70-1-104(4), MCA; *In re Marriage of Hull,* 219 Mont. 480, 484-85, 712 P.2d 1317, 1320-21 (1986). However, this does not necessarily mean that such intangibles can be "taken" in the regulatory context. In its order, the District Court stated that "[a]n intangible interest in a business has never been held to be a proper subject of a regulatory taking claim." This is true. While goodwill and going-concern value can be taken as a result of government condemnation, appellants point to no cases where a taking of going-concern or goodwill has been found in the regulatory takings context.

¶ 56 In *Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), the Supreme Court established that, under limited circumstances, intangible assets like going-concern value can be taken in a manner requiring just compensation be paid to the owner. There, the Supreme Court held that when the government temporarily condemned a laundry plant, it was required to compensate plaintiffs for the going-concern value of trade routes. *Kimball,* 338 U.S. at 11-16, 69 S.Ct. at 1440-43. However, since *Kimball* was decided, courts have found these types of takings only in those rare circumstances where the government actually intends to take over the claimant's business and thereby appropriate the goodwill and going-concern value for its own use. Thus, the federal district court for the Eastern District of Michigan held no compensation was due for loss of going-concern value to a claimant's trucking business as a result of a government condemnation of land, because the claimant did not demonstrate that the government condemned the land with the intent of operating a similar business. *United States v. Five Parcels, 1.11195 Acres of Land, More or Less, Situated in the City of Detroit, Wayne County, State of Michigan,* 765 F.Supp. 1283, 1286 (E.D.Mich.1991). The federal district court for the Western District of Michigan stated the general approach to these questions as follows:

> The Court concludes that where, as in this case, 1) the government intends to construct facilities in substitution for an existing business; 2) the new business is operated

> under the government's pervasive regulation; 3) the government creates a monopoly situation and realizes a pecuniary interest by doing so, the government's activity is tantamount to the operation of the ongoing concern which, in turn, comprises a business taking.

United States v. 0.88 Acres of Land, 670 F.Supp. 210, 213 (W.D.Mich.1987).

¶ 57 As the jurisprudence in this area makes plain, taking of goodwill or going-concern value differs markedly from other types of taking. This is likely because what the claimant alleges has been "taken" is an expectation of future profitability.[7] As the United States Supreme Court stated in *Andrus,* a "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Andrus,* 444 U.S. at 66, 100 S.Ct. at 327. In cases such as *Kimball,* where there is an actual physical occupation of land by the government,

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[7] Black's defines "going-concern value" as "value of a commercial enterprise's assets or the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or its assets." *Black's Law Dictionary* 1587 (Bryan Garner ed., 8th ed.2004). "Good will" is defined in part as "the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets." *Black's* at 715.

fundamental property rights are implicated; thus, if the going-concern value is based upon a right or ability to exclusive use of the property which the government is occupying, it makes sense to provide compensation for the value lost. Turning to this case, it is important to note that appellants cite no authority for the proposition that compensation of the loss of their intangible assets should be paid under their regulatory takings claims. Any citation to *Kimball* is unavailing for the simple reason that *Kimball* involved actual physical occupation of land – a critical fact which is absent in this case.

¶ 58 An expectation of profitability in a highly regulated field of business, where a license or permit is required for participation, is virtually never, in and of itself, considered a compensable property interest. In *Mitchell Arms,* for instance, the Federal Circuit Court of Appeals found that an arms dealer had no cognizable property interest in an expectation of selling assault rifles in domestic commerce, because that right was totally dependent upon the government's granting him a license to sell those weapons. *Mitchell Arms*, 7 F.3d at 217. Thus, when the government withdrew the permit, the arms dealer had no basis upon which to assert a takings claim because all the government "'took' . . . [was] the ability to realize an expectation in the ultimate market disposition of the rifles. This 'collateral interest' incident to [the] ownership of the rifles is not property protected by the Fifth Amendment." *Mitchell Arms,* 7 F.3d at 217; *See United States v. Gen. Motors Corp.*, 323 U.S. 373,

378, 65 S.Ct. 357, 360, 89 L.Ed. 311 (1945) ("[T]he Fifth Amendment concerns itself solely with the 'property,' i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.").

¶ 59 Similarly, in *Allied-General Nuclear Servs. v. United States,* 839 F.2d 1572 (Fed.Cir.1988), the Federal Circuit Court of Appeals found that a private company which had been induced by the federal government to invest $200 million dollars into the development of a nuclear power plant, had no takings claim when the government suddenly changed its mind and decided that the construction of the plant would represent a danger to national security. *Allied-General,* 839 F.2d at 1576-78. The Court of Appeals noted that the licensing power of the government when "use[d] for purposes within the object of the power reserved will be valid even if detrimental to the owner's full utilization of the property." *Allied-General,* 839 F.2d at 1577 (citing *Nollan v. California Coastal Commn.,* 483 U.S. 825, 832-35, 107 S.Ct. 3141, 3146-47, 97 L.Ed.2d 677 (1987)). The appeals court rejected the notion that excessive inducement from the government to enter into this area and expend significant amounts of money should alter its conclusion, finding that in the absence of a direct contract between the government and the private corporation, the expectation of profiting in such a highly regulated and risky field could not by itself be considered a compensable property interest. *Allied-General,* 839 F.2d at 1577-78. More recently, in

Hawkeye Commodity, the Eighth Circuit found that a company had no property interest in a right to continued operation in the state-regulated lottery business. *Hawkeye Commodity,* 486 F.3d at 439-40. Thus, when the state of Iowa enacted legislation which prohibited a particular type of lottery game, the company, which had been previously engaged in that type of business, had no basis for a takings claim. *Hawkeye Commodity,* 486 F.3d at 440.

¶ 60 Similarly, in *Huntleigh USA Corp. v. United States,* 75 Fed.Cl. 642 (Fed.Cl.2007), the Federal Claims Court found no compensable property interest when the government federalized airport screening in 2001 under the Aviation and Transportation Security Act (ATSA), and allegedly "took" the company's entire screening business, including its "contracts, goodwill and going concern value." *Huntleigh,* 75 Fed.Cl. at 645. The Claims Court concluded it was immaterial whether the private company could have anticipated the regulatory changes, because the federal government retained the ability at all times to make those regulatory changes. *Huntleigh,* 75 Fed.Cl. at 646. In *Huntleigh USA Corp. v. United States,* 525 F.3d 1370 (Fed.Cir.2008) (*Huntleigh II*) – a case cited, but not discussed or analyzed by the Dissent at ¶¶ 167, 168, 201 – the Federal Court of Appeals affirmed the claims court decision in *Huntleigh.* In affirming the lower court, the court noted that Huntleigh's argument was not whether the government actually "took" its screening contracts – because there was no physical condemnation or occupation by the ATSA – but

rather whether the regulatory change embodied in the federalization of airport screening under the ATSA "rendered the contracts and the going concern value and goodwill associated with Huntleigh's security screening business worthless." *Huntleigh II,* 525 F.3d at 1379. When Congress federalized airport screening under the ATSA "it effectively eliminated the market for [Huntleigh's services], given that it concentrated all screening functions in the federal government. Thus . . . Huntleigh and the other airlines with which it had contracts treated their contracts as terminated upon the government's full assumption of screening functions at airports, resulting in considerable loss of business to Huntleigh." *Huntleigh II,* 525 F.3d at 1375.

¶ 61 However, while the ATSA frustrated Huntleigh's business expectations, it did not take any of Huntleigh's property within the meaning of the Fifth Amendment. *Huntleigh II,* 525 F.3d at 1380-82. Accordingly, the Federal Court of Appeals distinguished the application of *Kimball* as follows:

> Our reasoning applies to all property interests possessed by Huntleigh, including its contracts and any going concern value or goodwill associated with its security screening business. Thus, the authority of *Kimball Laundry* does not alter our holding. Though going concern value and goodwill are indeed compensable property interests, *Kimball Laundry,* 338 U.S. at 11, 69 S.Ct. 1434, those property interests, like Huntleigh's contracts, were merely "frustrated" by the government's

> enactment of ATSA. They were not taken. Moreover, going concern value is a property interest that has been held to be compensable in the context of a temporary, but not a permanent, taking.

Huntleigh II, 525 F.3d at 1382 n. 3.

¶ 62 Huntleigh's unsuccessful argument is nearly identical to that advanced by the appellants. It is indisputable that in the enactment and enforcement of I-143, the State has not "appropriated for its own use any property owned by [the appellants]." *Huntleigh II,* 525 F.3d at 1381. Thus, I-143 did not physically appropriate or "take" any of the appellants' property, although it did eliminate the in-state market for fee-shooting and had a significant impact upon the value of their businesses.

¶ 63 In this case, appellants have alleged a taking of their intangible business assets because I-143 eliminated the in-state market for fee-shooting. In other words, I-143 has "taken" appellants' ability to profit from fee-shooting. Yet, as is clear from the foregoing authorities, these interests are not compensable in this case under the Fifth Amendment or Article II, § 29 of the Montana Constitution because there has been no physical condemnation or occupation of appellants' property by the State. We disagree with appellants' assertions that the District Court was splitting hairs by not considering the economic impact on the intangible aspects of their businesses and licenses. The District Court correctly recognized that takings claims for goodwill and going-concern

value have never been recognized in the regulatory taking context. The unique circumstances required to assert a taking of these intangible assets, namely a physical condemnation of some sort by the State, are not present in this case.

¶ 64 Accordingly, the District Court did not err when it found that appellants were not entitled to compensation for damage to the goodwill and going-concern value of their businesses as a result of I-143.

¶ 65 **Issue Two:** *Did the District Court err in concluding that the enactment and enforcement of I-143 did not amount to a taking of appellants' real and tangible personal property under the Fifth Amendment and Article II, Section 29 of the Montana Constitution?*

¶ 66 We now address appellants' contention that I-143 effected a regulatory taking of their real and personal property – i.e., their land and attached fixtures, and their livestock. There is no question that a person has a compensable property interest arising out of the ownership of such real and personal property.

¶ 67 Once a claimant establishes a compensable property interest, "the court must then determine whether a part or a whole of that interest has been appropriated by the government for the benefit of the public." *Members*, 421 F.3d at 1330. Initially, courts assumed that "the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's]

possession." *Lucas,* 505 U.S. at 1014, 112 S.Ct. at 2892 (citations and quotations omitted, alterations in original). In the modern world, it is well-established that state action or regulation may go "too far," and constitute a taking, in the absence of physical invasion or outright appropriation. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414-15, 43 S.Ct. 158, 159-60, 67 L.Ed. 322 (1922).[8] These so-called "regulatory takings" fall into one of two categories.

> First, where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)

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[8] Curiously, the Dissent criticizes the Court for claiming that regulatory takings were not recognized prior to *Pennsylvania Coal* in 1922. (Dissent at ¶¶ 140-141.) However, this statement is both historically accurate and well-established.

> [U]ntil the Court's watershed decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), "it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the functional equivalent ~~of~~ a 'practical ouster of [the owner's] possession.'" *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (citations omitted and emphasis added; brackets in original); see also *id.,* at 1028, n. 15, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

Lingle, 544 U.S. at 537, 125 S.Ct. at 2081.

> (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. *Lucas,* 505 U.S., at 1019, 112 S.Ct. 2886 (emphasis in original).

Lingle, 544 U.S. at 538, 125 S.Ct. at 2081.

¶ 68 In other words, aside from an outright physical invasion, a "categorical taking" is deemed to have occurred when a regulation or state action forces an owner "'to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle. . . .'" *Seven Up Pete,* ¶ 21 (quoting *Lucas,* 505 U.S. at 1019, 112 S.Ct. at 2895). Thus, when land or other interests retain economic value, no categorical taking has occurred. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 330-32, 122 S.Ct. 1465, 1483-84, 152 L.Ed.2d 517 (2002).

¶ 69 However, even when a compensable property interest still retains economic value, just compensation may be required if "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. Determining when such compensation is required is essentially an "ad hoc, factual inquiry" based on the circumstances of each case. In *Penn Central,* the

Supreme Court suggested that courts examine the following factors in the course of making this determination: (1) the character of the governmental action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant. *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. While courts may consider all three factors, in some cases one or more are dispositive. *E.g., Ruckelshaus,* 467 U.S. at 1005-06, 104 S.Ct. at 2874 (finding the reasonable investment-backed expectation prong dispositive under *Penn Central* analysis).

¶ 70 In jurisprudence under *Penn Central,* courts have fleshed out the practical meaning of each of these factors. In analysis of the first factor, the "character of the governmental action," the inquiry focuses primarily on "whether the [governmental action] amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good. . . .'" *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082 (quoting *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646). In *Lingle,* the United States Supreme Court clarified that under the "character of the governmental action" prong of the *Penn Central* regulatory takings analysis, whether a challenged regulation "substantially advances" a legitimate state interest "is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation." *Lingle,* 544

U.S. at 545, 125 S.Ct. at 2085. While the Supreme Court did not state with perfect clarity how the character of the governmental action is to be measured, it did state that

> [T]he "substantially advances" inquiry reveals nothing about the *magnitude or character* of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Lingle, 544 U.S. at 542, 125 S.Ct. at 2084.

¶ 71 The rejection of the "substantially advances" formula with respect to the character of the governmental action prong was simply meant to ensure that courts correctly quantify the effect of the regulation in terms of actual property rights and the magnitude of the infringement on those rights. Physical occupations, however slight, automatically require some form of compensation "because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the

most fundamental of all property interests." *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082. Similarly, the "complete elimination of a property's value" may give rise to a "categorical" or total regulatory takings. *Lingle,* 544 U.S. at 539-40, 125 S.Ct. at 2082. Regulatory takings, by contrast, turn more on the magnitude of the economic impact and "the degree to which it interferes with legitimate property interests." *Lingle,* 544 U.S. at 540, 125 S.Ct. at 2082. Thus, under the "character of the governmental action" prong courts should inquire concerning the magnitude or character of the burden imposed by the regulation, and determine whether it is functionally comparable to government appropriation or invasion of private property.

¶ 72 Under the "reasonable investment-backed expectations" factor, the claimant's expectation must be "reasonable . . . [and] must be more than a unilateral expectation or an abstract need." *Ruckelshaus,* 467 U.S. at 1005-06, 104 S.Ct. at 2874 (quotation omitted). This factor limits takings claims to those who can "demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1190 (Fed.Cir.2004) (quotation omitted). "This factor also incorporates an objective test – to support a claim for a regulatory taking, an investment-backed expectation must be 'reasonable.'" *Cienega Gardens v. United States,* 331 F.3d 1319, 1346 (Fed.Cir.2003). Under the third criteria, "economic impact," the court measures

the impact of the regulatory change by considering "the change in the fair market value of the subject property caused by the regulatory imposition – in other words, the court must 'compare the value that has been taken from the property with the value that remains in the property.'" *Arctic King,* 59 Fed.Cl. at 374 (quoting *Keystone,* 480 U.S. at 497, 107 S.Ct. at 1248). In assessing this factor, the court will look at the magnitude of the impact on the "parcel as a whole." *Rose Acre Farms,* 373 F.3d at 1185 (citing *Penn Central,* 438 U.S. at 130-31, 98 S.Ct. at 2662).

¶ 73 With respect to the land, the District Court found there was no categorical taking under *Lucas* because the evidence showed those lands still retained substantial economic value; indeed, some of those lands even appreciated. The District Court also rejected appellants' arguments that they were entitled to just compensation for these interests under the *Penn Central* analysis. Under the "economic impact" factor, the District Court concluded that appellants did not show that their real estate interests suffered any significant economic impact as a result of I-143, and further that they failed to demonstrate any change in the fair market value of their land as a result of I-143. *See* ¶¶ 13-15.

¶ 74 The District Court did recognize a substantial economic impact on appellants' alternative livestock; however, it concluded that the economic impact was not severe, in part because none of the appellants reported taxable profit on their tax returns for the years their Game Farms were in

operation. Under the "reasonable investment-backed expectations" factor, the District Court acknowledged that appellants' had significant expectations, but noted "their subjective expectation of profit must be legally tempered by the objective reality that they were engaged in a highly regulated and speculative new industry." The District Court concluded all appellants knew the Game Farm industry was highly regulated, that they were allowed to participate in the business because the privilege was extended by the State, and that they knew the regulations could change.

¶ 75 With respect to the "character of the governmental action," the District Court concluded that I-143 was a valid exercise of the State's police power. The District Court cited to ample authority demonstrating that when a state exercise of police power is valid, "its actions may injure investment-backed expectations with respect to commerce in the goods at issue without having to pay compensation." One line of authority on which the District Court placed particular reliance was a series of prohibition-era cases showing that state action could put an industry completely out of business without having to pay just compensation so long as the state action was a valid exercise of police power. *E.g., Mugler v. Kan.,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887); *James Everard's Breweries v. Day,* 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924). Further, the District Court found that I-143 prohibited only one use of the alternative livestock – i.e., charging a fee to shoot

them – and that otherwise appellants maintained all their rights and property interests in the alternative livestock. As a result, I-143 left appellants "free to make other economically viable use of their property, removing only one potential use that has been validly deemed to be injurious to public health, safety, and welfare."

¶ 76 Appellants challenge the District Court's application of each of the *Penn Central* factors. With respect to the economic impact of I-143, appellants assert that the District Court improperly relied on the lack of a taxable profit in their tax returns, and failed to appreciate the impact I-143 had on their alternative livestock and real estate interests.

¶ 77 Under the "reasonable investment-backed expectations" factor, appellants assert the District Court was wrong to conclude that their expectations were not reasonable, in spite of the fact that the Game Farm industry was highly regulated. They assert that I-143 was not in fact a regulation of the Game Farm industry, but instead a prohibition against Game Farms which destroyed their property. Appellants maintain that they reasonably expected some changes in the regulations governing the Game Farm industry, but that it is not reasonable to expect them to anticipate a regulatory change, based on the whims of Montana voters, which would wipe out the in-state market for fee-shooting. Appellants cite to *Cienega Gardens* and *NRG Co. v. United States.*, 24 Cl.Ct. 51 (1991) in support of their argument under this factor.

¶ 78 With respect to the "character of the governmental action" factor, appellants criticize the District Court for focusing too much on whether I-143 was a valid exercise of the State's police power, and too little on the actual purpose behind takings jurisprudence: to prevent the government from forcing a few individuals to bear an economic burden which should be borne by society as a whole. In light of *Lingle,* appellants' argue it is legally inappropriate to conduct a "means-ends" analysis to determine whether I-143 substantially advances legitimate state interests. Instead, they argue, the proper focus should be on the nature of the interference with appellants' property interests and whether I-143 requires appellants to unfairly shoulder the economic burden of eliminating the in-state market for fee-shooting.

¶ 79 With these arguments in mind, we will examine the appellants' remaining compensable property interests under the *Penn Central* factors.

C. Appellants' Real Estate Interests and Fixtures

¶ 80 The District Court correctly determined that I-143 did not effect a taking of appellants' real estate interests, including appellants' land and the fixtures constructed for the purpose of operating Game Farms. In this regard, we find the "economic impact" factor dispositive because Appellants presented no evidence to support their claims that I-143

had a measurable economic impact on their lands and fixtures.

¶ 81 The State presented expert testimony and evidence at trial which showed that the "highest and best use" of appellants' lands were for uses other than Game Farms, and that they all retained significant value in spite of I-143; indeed, most of those lands even appreciated. Other than simply disagreeing with this view, appellants offered no evidence – such as appraisals of their own – to support the contention that these findings were clearly erroneous. Indeed, appellants' experts admitted at trial that they had conducted no appraisals of the real property or fixtures themselves. Instead, appellants presented expert testimony to the effect that I-143 constituted a categorical taking of their businesses and the Licenses themselves. But the District Court was correct to give no weight to this expert testimony, because those interests are not compensable under the circumstances at bar. Moreover, a review of the expert opinions presented by appellants shows that these experts did not understand how the *Penn Central* takings analysis is actually applied by the courts.

¶ 82 There was testimony from Mr. Bridgewater that his property was less marketable without an operating Game Farm, but at any rate it is equally true that the Bridgewaters' land had appreciated 100% since its date of purchase. Additionally, while the Kafkas contended that certain restrictive covenants in their title documents precluded the alternative uses which the State's appraisal deemed

appropriate, the District Court adequately addressed this issue by taking notice of the fact that these covenants had been removed by the Kafkas and Hill County, and did not impair the marketability of their lands for uses other than Game Farms.

¶ 83 Applying the "parcel as a whole" standard to appellants' real estate interests, including their land and fixtures, we find that the "economic impact" factor weighs overwhelmingly against finding a compensable taking. Appellants have not shown that I-143 had any economic impact on their lands, and have not presented evidence to counter the weight of the State's evidence. In short, they provide no basis to assert a taking of their real estate interests, regardless of the weight of the remaining two factors. Accordingly, the District Court did not err in concluding I-143 did not constitute a regulatory taking of appellants' compensable property interests in their lands.

D. Alternative Livestock

¶ 84 Next we turn to appellants' claim that their alternative livestock was "taken" by I-143. Returning to the *Penn Central* analysis, we will first examine the economic impact of I-143. In this connection, we agree with appellants that the District Court underestimated the economic impact that I-143 had on their alternative livestock. Unlike their real estate interests, appellants' have demonstrated that their alternative livestock suffered a significant

devaluation as a result of I-143. Prior to I-143, the Kafkas received approximately $5,000 to $6,000 per head of alternative livestock; after I-143 that figure was reduced to $1,700 to $1,800. This represented a devaluation of roughly 70%. The District Court had evidence before it suggesting similar or greater devaluations for both the Bridgewaters and the Boumas, although it did not cite to this evidence in its order. According to the record, the Bridgewaters once had received approximately $8,000 to $9,000 for each head, while after I-143 they sold 160 head to an out-of-state interest for approximately $80,000, representing a price of around $500 per head, or a roughly 95% devaluation. The Boumas had sold their animals for roughly $5,000 a head before I-143, while after its passage they received $500 per head. These figures show a devaluation in the neighborhood of 90%.

¶ 85 Moreover, the facts in the record support the view that this diminished value was insufficient to even cover the cost of raising and maintaining those livestock. While there do exist some markets for their alternative livestock either for meat or antlers, or for resale to out-of-state markets, the return from such activities is less than the actual cost of maintaining the alternative livestock. In other words, after I-143, appellants could only sell the alternative livestock at a loss. This factor weighs in favor of finding a compensable taking of appellants' alternative livestock.

¶ 86 We turn next to the second *Penn Central* factor, the "character of the governmental action." We

start with the proposition that I-143 places the economic burden of eliminating Game Farms in Montana squarely on the shoulders of individuals, like the appellants, who have entered into this industry in reliance on the continued legality of fee-shooting. As such, it seems to run afoul of one of the primary policy concerns animating takings jurisprudence, namely the notion that the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Whatever the rationale for preventing fee-shooting, it is clear that individuals like appellants, and not the public as a whole, are being asked to bear the burden.

¶ 87 However, the type of intrusion upon the alternative livestock embodied by I-143 is minimal. The animals have not been seized by virtue of I-143 – they still belong to the appellants. Moreover, Appellants may still sell their animals to out-of-state markets for any usage, and may even allow others to shoot them in Montana, so long as no fee is charged. It is well-established that regulations which impair or significantly decrease the profitable use of property do not amount to a taking. In *Andrus,* for instance, the Supreme Court held that an act of Congress which banned the sale and transfer of eagle feathers, did not amount to a taking of the eagle feathers because the property holders still maintained the rest of the bundle of rights, and could still make some

minimal use of the eagle feathers. *Andrus,* 444 U.S. at 65-66, 100 S.Ct. at 327. The Supreme Court acknowledged that the act deprived claimants of the ability to make profitable use of the eagle feathers, but declined to find a taking in large measure because they did not have a right, under the Takings Clause to make profitable use of the eagle feathers. "[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus,* 444 U.S. at 65-66, 100 S.Ct. at 327.

¶ 88 Thus, the "character of the governmental action" with respect to the animals is minimally intrusive. If the nature of the intrusion was greater and I-143 affected other segments of appellants' bundle of rights in the alternative livestock, such as their right to sell the live animals or slaughter them for market, then this factor might lean more in their favor because appellants, and not the general public, are shouldering this burden. As it stands, however, the intrusion is so slight that this factor must weigh against finding a compensable taking.

¶ 89 Thus we turn to the final *Penn Central* factor, "reasonable investment-backed expectations." With respect to the alternative livestock, appellants' investment-backed expectations were that they could charge a fee to shoot them. Indeed, that is why they expended significant financial resources on their respective operations to begin with. The District Court

acknowledged these expectations but concluded that they "must be legally tempered by the objective reality that they were engaged in a highly regulated and speculative new industry." While one can maintain reasonable investment-backed expectations in highly-regulated industries, e.g., *Ruckelshaus*, 467 U.S. at 1010-11, 104 S.Ct. at 2877 (finding reasonable investment-backed expectations in the pesticide industry), *United Nuclear Corp. v. United States.*, 912 F.2d 1432, 1436-37 (Fed.Cir.1990) (finding distinct investment-backed expectations in the mining industry), we agree with the view, as articulated by the District Court, that the regulated and speculative nature of a particular industry should be considered in determining whether investment-backed expectations are reasonable. In this case, then, the question becomes whether it was reasonable for appellants to maintain an investment-backed expectation that they would always be able to charge a fee to shoot alternative livestock in Montana, and that the State could or would not interfere with this expectation. We find that such an expectation is not reasonable; thus, this factor weighs against finding a compensable taking of appellants' alternative livestock.

¶ 90 In this regard, the facts at bar distinguish this case from both *Cienega Gardens* and *NRG Co.*, the two cases upon which Appellants rely. In *Cienega Gardens*, owners of low-income apartments sued the government for an unconstitutional taking after Congress nullified their contractual rights to prepay forty-year mortgage loans entered into with the

Department of Housing and Urban Development (HUD) after a period of twenty years. *Cienega Gardens,* 331 F.3d at 1323. This congressional action was significant to the owners because so long as they participated in the HUD loan program, they were forced to charge rental rates far below market value. The Federal Court of Appeals agreed and found that the term in their contract with the Government guaranteeing them the right to exit the HUD program after twenty years by paying off their loans was "an explicit and material term of their mortgage contracts [and] simply not a change the . . . Plaintiffs should have anticipated." *Cienega Gardens,* 331 F.3d at 1351.

¶ 91 Similarly, in *NRG Co.,* the Federal Claims Court found an unconstitutional taking under the Fifth Amendment when Congress cancelled mining prospecting permits held by several private companies. *NRG Co.,* 24 Cl.Ct. at 52-55. In that case, the U.S. Government issued permits to several private companies, but Congress later unilaterally cancelled those permits, and related leases, out of concerns that the proposed mining operations would negatively impact Indian tribes on whose lands those operations would be conducted. *NRG Co.,* 24 Cl.Ct. at 55-56. In analyzing the companies' regulatory takings claims, the Claims Court found the companies had reasonable investment-backed expectations that, once they obtained the permits, they would have the option to obtain valuable mineral leases, and that the congressional acts cancelling those permits after they

had already been issued was not reasonably within those investment-backed expectations. *NRG Co.*, 24 Cl.Ct. at 61-63.

¶ 92 Here by contrast, the State never assured appellants they would always be permitted to charge a fee to shoot alternative livestock in Montana. Further, we agree with the District Court that appellants knew, or should have known, that Game Farm operations were highly controversial in Montana and that initiative measures could have been passed which would outlaw Game Farms entirely. The record is clear that FWP was aware of the significant public unrest and imparted this information to the Kafkas beginning in 1996. *See* ¶ 12. Other appellants should have been aware of these same facts. Nothing in the regulations, Licenses, or statutes, provides any assurance that the regulations could not be changed and appellants received no guarantees from the State that their operations would continue to be lawful.

¶ 93 We conclude that appellants should have reasonably anticipated that the Game Farm industry might be phased out due to health and safety-related concerns over CWD, or even that the State might make the regulatory burden of participating in this field so onerous that Game Farms would no longer be profitable enterprises. In other words, appellants could not maintain a reasonable investment-backed expectation that they would be permanently insulated against the possibility that the Game Farm industry would be either regulated so as to eliminate its profitability, or completely abolished. As a result,

since appellants could have reasonably anticipated the complete elimination of Game Farms by the State or regulations that would make participation in the field unprofitable, they should have also anticipated that the State could make the operations less profitable by eliminating the in-state market for fee-shooting. Although appellants may not have specifically anticipated the passage and enactment of I-143, the practical effect of I-143 – i.e., the elimination of the in-state market for fee-shooting – should have been within their reasonable investment-backed expectations, given the absence of assurances on this point from the State. Accordingly, the "reasonable investment-backed expectation" factor weighs against finding a compensable taking of appellants' livestock.

¶ 94 The *Penn Central* test ultimately calls for a weighing or balancing of these factors in order "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082. Utilizing this approach, we have concluded that the purported taking here is not the functional equivalent of a direct appropriation of property, nor does it constitute an ouster from appellants' domain. In weighing these factors together, we are mindful of the admonition that "[r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus,* 444 U.S. at 65, 100 S.Ct. at 327. After weighing the effects of I-143 under the *Penn Central*

factors, and particularly the "character of the governmental action" factor, we conclude that appellants are not entitled to just compensation for the regulatory taking of their alternative livestock.

CONCLUSION

¶ 95 In summary, we affirm the District Court's findings of fact and conclusions of law regarding appellants' claims for compensation with respect to their Licenses, the goodwill and other intangible assets of their businesses, their real estate and fixtures, and their alternative livestock.

We concur: KARLA M. GRAY, WILLIAM LEAPHART, DEBORAH KIM CHRISTOPHER, District Court Judge, DEBORAH KIM CHRISTOPHER, sitting for Justice JOHN WARNER.

Justice JAMES C. NELSON, dissenting.

I. INTRODUCTION

¶ 96 *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*[1]

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[1] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

¶ 97 Ninety-one years ago, the State of Montana made it a lawful "business or occupation" to acquire, breed, own, harvest, sell, and otherwise control privately owned game animals on alternative livestock ranches. As recently as 1999, the State suggested this as "a viable economic opportunity" for any private property owner, as well as the traditional livestock producers who were interested in diversifying their ranch productivity. Although the State regulated alternative livestock ranching, the regulatory scheme provided that these businesses could continue so long as the owner paid the licensing fee each year and complied with all recording and reporting requirements. Among other things, the State sanctioned "fee shooting," where members of the public could pay to shoot a preselected animal on an alternative livestock ranch under the supervision of a guide. Indisputably, fee shooting was the primary source of income for the alternative livestock businesses.

¶ 98 With the State's blessing, and in reliance on this governmental enabling, the Kafkas, the Bridgewaters, and the Boumas (collectively, "the Ranchers") invested substantial capital and resources to create going concerns. But then the State turned around and told the Ranchers that while they could continue to acquire, breed, and harvest their alternative livestock, they could no longer charge a fee for hunting the livestock. In thus prohibiting remuneration for the key economic activity on which the Ranchers' businesses depended, the State effectively

legislated those businesses out of existence. The State zeroed out the Ranchers' intangible assets (e.g., goodwill and going-concern value) and left them with a collection of tangibles whose value was either worthless or substantially diminished.

¶ 99 The Court holds today that the Ranchers are not entitled under the United States Constitution or the Montana Constitution to any compensation for the obliteration of their businesses caused by the passage of Initiative No. 143 ("Initiative" or "I-143") in November 2000. The Court acknowledges that the Ranchers suffered substantial property devaluation as a result of the Initiative, but the Court decides that such loss is not compensable because the State did not physically condemn or occupy the Ranchers' property and because the Ranchers should have anticipated a prohibition on charging a fee for alternative livestock hunts. As will surely come as a surprise to many Montana business owners, the Court announces that, absent an explicit "assurance" from the State, the businessman or businesswoman has no reasonable expectation in being able to receive remuneration for the goods and services he or she provides. Thus, when the State says, "Go ahead and market your products, but don't charge anything for them," the business owner is simply out of luck if his or her business is destroyed as a result.

¶ 100 At bottom, the Court holds that any individual in this State who, with the State's encouragement, invests capital and resources to create a going concern, but who does so in a field that this

Court considers "highly controversial," simply has no compensable interest in that business. Therefore, when the State up and decides to legislate the business out of existence – through the unique expedient of depriving the business of any income – the State need not provide any compensation for the owner's loss of property.

¶ 101 The injustice in treating Montana business people and property owners in this manner is manifest, not to mention legally indefensible. I strenuously disagree with the Court's determination that the Ranchers, and others similarly situated, are without a remedy for a taking of their property. I also cannot subscribe to the Court's faulty rationales in reaching this result. I therefore respectfully dissent from the Court's decision.

II. PRELIMINARY MATTERS

¶ 102 The issues in this case are unquestionably complex, in large part because takings jurisprudence itself is "a confused body of law containing contradictory principles and standards." John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion,* 17 Vt. L.Rev. 695, 696 (1993). The Court, the District Court, the State, and the Sportsmen have further confounded the proper resolution of this case by mischaracterizing the impact of I-143 on the Ranchers' property interests and by injecting into this case a number of inapt legal theories and irrelevant

factual matters. For these reasons, and to lay the foundation for my analysis of the Ranchers' claims, I first address the following four subjects:

A. The regulatory history of alternative livestock ranching.

B. The purpose and impact of I-143.

C. Inapplicability of police power/noxious use theory.

D. Misplaced reliance on due process considerations.

After clarifying these preliminary matters in Part II, I proceed in Part III with an analysis of the Ranchers' entitlement to just compensation for a taking of their property under the Fifth Amendment to the United States Constitution.

A. The Regulatory History of Alternative Livestock Ranching

¶ 103 On March 15, 1917, the Montana Legislature passed an act which, among other things, declared it lawful for any person, company, or association to engage in the "business or occupation" of propagating, owning, and controlling wild game animals of this State upon premises owned, leased, or controlled by such person, company, or association. Laws of Montana 1917, ch. 173, § 84, *as amended,* Laws of Montana 1919, ch. 200, § 1, *codified at* § 3777, RCM (1921). The business owner was required to pay an annual license fee and comply with

any regulations prescribed by the State Fish and Game Commission. In addition, a statement of the place where "such business" was to be conducted and the game proposed to be raised on said premises had to be filed with the Commission. Section 3777, RCM. To this end, upon obtaining a permit from the Commission, the business owner was authorized "to capture alive such . . . game quadrupeds as may be necessary for foundation stock for such game farm." Section 3777, RCM. Finally, once the game farm was "in successful operation," the owner was authorized to "sell, transfer, or dispose of the game so bred and raised by him, as he might do with domestic live stock, and without restriction so to do." Section 3777, RCM.

¶ 104 The statutory scheme underwent a number of revisions in 1925, 1933, and 1947. Most of these changes are not pertinent to the instant appeal, though the following are worth noting. In 1925, the Legislature added an explicit fencing requirement and made it unlawful for any person to enter a properly fenced game farm without the owner's consent. *See* Laws of Montana 1925, ch. 192, § 31. The Legislature also provided that "the product of such game or fur-farm may be dealt with and sold as private property," Laws of Montana 1925, ch. 192, § 31, *codified at* § 3777, RCM (1935); however, this language was not carried forward in the 1947 version of the statute, *see* § 26-1201, RCM (1947). In 1947, the Legislature clarified that a permit must be procured "before" establishing a game farm but that a game

farm permit "shall" be issued to "responsible" applicants who own or lease, and have properly fenced, the premises on which their operations are to be conducted. Laws of Montana 1947, ch. 120, § 1. Thereafter, the statutory scheme remained substantially unchanged through 1982.

¶ 105 In March 1982, Governor Ted Schwinden appointed a 13-member Game Farm Task Force – consisting of sportsmen, game farm operators, bird farm owners, ranchers, and state officials – to develop definitive legislation addressed to concerns about game farming in Montana. The culmination of the task force's work, Senate Bill No. 448 ("SB 448"), was passed by the 1983 Legislature. It repealed the existing game farm laws and replaced them with an entirely new statutory framework. *See* Laws of Montana 1983, ch. 570. Among other things, the new scheme clarified that all game farm animals lawfully raised on a licensed game farm "are the private property of the licensee," § 87-4-414(1), MCA (1983); that the licensee "may acquire, breed, grow, keep, pursue, capture, kill, use, sell, or dispose of the game farm animals and their progeny in any quantity, at any time of year, and in any manner, as long as he complies with the requirements of [Title 87, chapter 4, part 4, MCA]," § 87-4-414(2), MCA; and that the laws applicable to *game* animals do not apply to *game farm* animals on a licensed game farm, § 87-4-414(4), MCA. The hunting and sale of game farm animals was explicitly recognized in §§ 87-4-414(3), -415(1), and -421, MCA. Persons wishing to operate a game

farm were still required to obtain a license, *see* §§ 87-4-407, -409, MCA; however, once obtained, renewal of the license was a matter of right "upon payment of the renewal fee if the licensee has not violated any provision under which the license was granted," § 87-4-412(1), MCA. Finally, the reporting requirements were set out in greater detail than previously. *Compare* § 87-4-404, MCA (1981), *with* § 87-4-417, MCA (1983).

¶ 106 Notably, the original version of SB 448 differed in a number of critical respects from the proposed legislation submitted by the Game Farm Task Force. Among other things, the drafters of SB 448 gave the Department of Fish, Wildlife, and Parks discretion as to whether a game farm license would be issued (assuming the game farm application was otherwise in order) by replacing the word "shall" with the word "may" in several places. The drafters also revised the provision regarding the renewal of licenses such that renewal would not be a matter of right. These sorts of changes prompted a somewhat scathing rejoinder by counsel representing the interests of game farm operators. In a February 1983 letter (which is part of the legislative history of SB 448), counsel pointed out that the proposed legislation submitted by the drafters "violated the intent" of the proposed legislation submitted by the Game Farm Task Force. At stake here, he stated, was "the private property right that every individual has to raise livestock as long as he complies with the other provisions of the Act as was discussed in the task

force." Counsel stated that unless the language of SB 448 was amended so that "it represents what the task force agreed upon and does not take away any rights that we negotiated," he would oppose the bill. Ultimately, his concerns were taken into account, and the final version of SB 448 passed by the Legislature, as described above, included the "rights" sought by the game farm operators and negotiated by the Game Farm Task Force.

¶ 107 The statutory scheme enacted in 1983 remained in place through November 6, 2000 (the day before I-143 went into effect), though various provisions were amended or added over the years. For instance, in 1993, the Legislature adopted new procedures and criteria for the issuance and revocation of game farm licenses, including additional fencing and enclosure requirements, and authorized licensees to transfer their game farm licenses. *See* Laws of Montana 1993, ch. 315, §§ 3, 4, 6, 12. The Legislature also eliminated the "shooting license" that game farmers had been required to obtain before allowing anyone to hunt on their property. *See* Laws of Montana 1993, ch. 315, § 7. In 1999, the term "game farm" was changed to "alternative livestock ranch." *See* Laws of Montana 1999, ch. 574, § 7. In addition, the Legislature added a provision explicitly recognizing the production of alternative livestock as "a viable economic opportunity for any private property owner as well as the traditional livestock producers who are interested in diversifying their ranch productivity." Laws of Montana 1999, ch. 574, § 1.

¶ 108 The substance of the statutory scheme as it relates to the instant appeal, however, remained substantially unchanged. All alternative livestock lawfully possessed on a licensed alternative livestock ranch were the licensee's "private property," which the licensee could "breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of . . . in any quantity and at any time of year." Section 87-4-414(1), (2) MCA (1999). Annual renewal of the alternative livestock ranch license was a matter of right under § 87-4-412(1), MCA, which instructed the Department of Fish, Wildlife, and Parks to renew each license "upon payment of the renewal fee if the licensee has complied with all recording and reporting requirements." Lastly, each license was transferable if certain criteria were met. Section 87-4-412(2), MCA.

¶ 109 So, to sum up this historical background, although the regulatory scheme went through a number of adjustments between 1917 and 2000, it was always a lawful "business or occupation" to acquire, breed, own, harvest, sell, and otherwise control privately owned game animals on an alternative livestock ranch. Furthermore, while the regulations designed to protect native wildlife (through safety and fencing requirements) became increasingly detailed and rigorous, so did the regulations designed to protect the business owners' interests (through explicit recognition of their alternative livestock as "private property" and their businesses as "viable economic opportunities," and through the guarantee that their licenses would be renewed each year upon

payment of the renewal fee and compliance with all recording and reporting requirements).

B. The Purpose and Impact of I-143

¶ 110 On November 7, 2000, the voters passed I-143, which altered the statutory scheme in several significant respects. *See generally* Laws of Montana 2001, 2000 Ballot Issues, Initiative No. 143, §§ 1-9. First, it prohibited the establishment of any new alternative livestock ranches. *See* §§ 1, 4. Second, it revoked the right of existing alternative livestock ranch operators to transfer their alternative livestock ranch licenses. *See* § 4. Lastly, it prohibited "the shooting of game animals or alternative livestock . . . for a fee or other remuneration on an alternative livestock facility." *See* § 6. These amendments took effect immediately. *See* § 11.

¶ 111 The Sportsmen have sought in this Court to portray I-143 as creating nothing more than a few "additional restrictions" on alternative livestock ranching. They assert that these "additional restrictions" are not so onerous as to amount to a taking of private property. The District Court likewise characterized I-143 as merely an "extension" of the existing regulatory framework. Remarkably, this Court minimizes the impact of I-143 even further, declaring it to be only a "slight" and "minimally intrusive" burden on the Ranchers' property interests. For the reasons which follow, these characterizations are baseless and patently misleading.

¶ 112 The Sportsmen inform us that they conceived, designed, and drafted I-143 "to address specific dangers stemming from the proliferation of game farms in this state." They list a number of such dangers: the threat posed by alternative livestock ranches to Montana's "proud heritage of ethical hunting"; the increased risk of disease (e.g., chronic wasting disease), hybridization, and competition to native wildlife posed by alternative livestock interacting with native elk and deer (as a result of escape, or nose-to-nose contact through the fence); and the "European style" privatization of wildlife. The Sportsmen also report that they opposed and sought to prohibit the "penned hunts" offered by many alternative livestock ranches. They note that this practice, which they criticize as "a sport for the wealthy," had become a "poster child" for anti-hunting groups. Finally, although the Legislature took action in 2000 to address concerns over chronic wasting disease – *see* Laws of Montana 2001, May 2000 Special Session, ch. 1 (imposing a moratorium on new applications for initial alternative livestock ranch licenses "until a live test for chronic wasting disease is developed and is approved by the department of livestock") – the Sportsmen assert that "the problems" associated with alternative livestock ranches were not "adequately addressed" by the legislative action. The Sportsmen thus characterize I-143 as "vital" to the protection of Montana's wildlife, to the availability of plentiful populations of big game, and to the preservation of Montana's proud tradition of hunting these animals

under fair-chase conditions. They conclude that I-143 serves "weighty" and "important" purposes.

¶ 113 Yet, notwithstanding the Sportsmen's concerns with disease, fair-chase hunting ethics, and privatization of wildlife, the Ranchers' activities remain lawful and state-sanctioned in most respects. I-143 did not revoke their alternative livestock ranch licenses, confiscate their alternative livestock, or impose stricter regulations on the care and management of the livestock. As a matter of fact, the Initiative does not prohibit the Ranchers from continuing to acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of alternative livestock. Section 87-4-414(2), MCA (2001). The Initiative allows the Ranchers to keep penned elk, in spite of the concern about contact between wild ungulates and alternative livestock and the concern about transmission of diseases through intermediate hosts. The Initiative also allows "penned hunts," in spite of the concern with preserving Montana's tradition of ethical fair-chase hunting. And the Initiative allows private ownership of alternative livestock, § 87-4-414(1), MCA, in spite of the concern over European-style privatization of wildlife. In short, I-143 neither outlawed alternative livestock ranches nor directly addressed any of the concerns cited by the Sportsmen in support of the Initiative. (The Sportsmen's concerns were set out in the Proponents' arguments included with the 2000 Voter Information Pamphlet.) I-143 did not create new regulations concerning fencing, it did not create new testing requirements for diseases, and people can

still shoot privately owned penned elk. I-143 actually addressed none of the "weighty" and "important" purposes for which it was promoted to the voters.

¶ 114 The reason for all of this is simple: The Sportsmen's ultimate goal was to shut down all alternative livestock businesses, and in drafting I-143, they recognized the constitutional implications of doing so outright. As explained by counsel for the Sportsmen during oral argument in the companion case, *Buhmann v. State* (No. 05-473):

> There was a recognition by my clients that if they passed a statute that simply said, "Every game farm is done tomorrow," that that would be a very difficult takings claim to defend against. And we didn't want to have to go down that road. And so the statute was carefully crafted to address the problem in a way that was not offensive to taking but at the same time benefitted the wildlife and the wildlife management of this State.

¶ 115 Thus, in a striking display of legerdemain, the Sportsmen devised the "carefully crafted" solution of imposing a ban on charging a fee for what remains a lawful activity in this State: shooting alternative livestock on alternative livestock ranches. They recognized that because the value of each alternative livestock business derived from its ability to sell "penned hunts," I-143 would effectively shut those businesses down by prohibiting remuneration for such hunts. Indeed, as the District Court aptly

observed: "I-143 does appear to have been intentionally crafted in such a way that would for all intents and purposes snuff out alternative livestock ranching and in the process possibly save the State from footing the bill in the event it was found that the obvious takings were compensable." Likewise, despite its attempts elsewhere in the Opinion to minimize the impact of I-143, the Court acknowledges that the Initiative's prohibition on fee shooting effectively "outlaw[ed] Game Farms entirely." Opinion, ¶ 92. Similarly, the Attorney General's explanatory statement of I-143 in the 2000 Voter Information Pamphlet points out that "[a]bolishing fee shooting may force closure of some game farms." Notably absent from the Voter Information Pamphlet, however, is any acknowledgement that the State might have to foot the bill for destroying the Ranchers' property rights. As a result, the voters were never required to weigh the costs and benefits of taking the Ranchers' property. They were simply asked whether an initiative "prohibiting new game farms, prohibiting transfer of existing game farm licenses, and prohibiting shooting of game farm animals for a fee" should be approved, given the dire public need described by the Proponents.

¶ 116 In blunt terms, the Sportsmen determined to rid Montana of a perceived blight, but euthanizing the Ranchers outright was thought to be too "offensive" and costly. So, they decided instead to pull the plug on the Ranchers' life-support. That way, they could argue that the Ranchers died of natural

causes and that the State, therefore, bears no responsibility. Counsel's assertion that this transparent charade is "not offensive" to the guarantee of just compensation for a taking of private property is dubious, if not preposterous. Moreover, that this ruse was wrapped in the mantle of Montana's "proud heritage of ethical hunting" is a stain on the sport that the Sportsmen purport to protect.

¶ 117 Even more troubling is the Court's decision to ratify this end – around the Constitution's just compensation requirement. This constitutional guarantee is worthless when the Court allows it to be circumvented by means of a "carefully crafted" political ploy. Moreover, the purpose of the constitutional guarantee is undermined when property rights can be devalued with no thought whatsoever as to the burdens and benefits involved. From the taxpayers' perspective, it is easy and painless to vote for an initiative such as I-143 when this Court holds that the government is free to take property without having to pay for it. Yet, if government regulation involves "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), then taxpayers should be required to weigh the costs of taking property against the expected public benefits of doing so. In point of fact, this weighing is mandated by fairness, efficiency, and the Constitution.

¶ 118 Given the Sportsmen's goals in drafting I-143, it is disingenuous to argue, as the Sportsmen

do, that the Ranchers have not suffered a taking of private property under the "additional restrictions" created by I-143 because the Initiative merely "modified" their alternative livestock ranch licenses and because the Ranchers "can continue operating as a game farm, albeit less profitably." The Court's assertion that I-143 made the Ranchers' operations only "less profitable" is similarly far-fetched. Opinion, ¶ 93. The purpose of I-143, as admitted by the Sportsmen themselves, was not to create a few "additional restrictions" (e.g., new testing and fencing regulations) that might incidentally make the business of alternative livestock ranching less profitable. The Initiative's purpose, rather, was to eliminate the economic viability of these businesses entirely and thereby make it unfeasible for the Ranchers and other alternative livestock business owners to operate their ranches at all. In this connection, the Sportsmen and the Court concede that the Ranchers invested in specialized equipment, inventory, and fixtures and expended significant financial resources to develop their property for the *specific* purpose of fee shooting. Moreover, the Court acknowledges that as a result of I-143, the value of the Ranchers' alternative livestock was diminished to such an extent that the Ranchers are no longer able to cover the cost of raising and maintaining the livestock. Opinion, ¶ 85. Simply put, I-143 was designed to shut down all alternative livestock businesses, and it succeeded in doing so. It is irrelevant that this was accomplished in a less direct and expeditious manner than passing a statute that simply said, "Every game farm is done

tomorrow." The result – destruction of the Ranchers' businesses – is clearly the same.

¶ 119 Ultimately, the Sportsmen's assertion that I-143 served "weighty" and "important" purposes is immaterial to our resolution of this appeal. The District Court and several other courts have already concluded that I-143 furthered legitimate state interests, and the Ranchers have not appealed these conclusions. *See Kafka v. Hagener,* 176 F.Supp.2d 1037, 1042 (D.Mont.2001); Or. on Mot. to Dismiss (Dkt.40) at 4, *Kafka v. Montana Dept. of Fish, Wildlife and Parks,* DV-02-059 (Mont.Dist. Oct. 21, 2002); *Spoklie v. Montana,* 411 F.3d 1051, 1059 (9th Cir.2005); *see also Hagener v. Wallace,* 2002 MT 109, ¶¶ 22-28, 309 Mont. 473, ¶¶ 22-28, 47 P.3d 847, ¶¶ 22-28. Rather, the point of this discussion is that I-143 was intended to shut down the alternative livestock industry without the State's having to pay for it, and thus the Sportsmen's and the Court's portrayals of I-143 as something other than it is – as merely a slight, minimally intrusive "adjustment" of the regulatory scheme – are implausible. Indeed, they are flat wrong. The Court even contradicts itself by arguing on one hand that I-143 amounts to a "slight" and "minimally intrusive" burden on the Ranchers' property interests, Opinion, ¶ 88, but on the other hand that the Ranchers "should have reasonably anticipated that the Game Farm industry might be phased out," Opinion, ¶ 93. "Phasing out" an entire industry is certainly not the result one would reasonably anticipate from a regulation whose intrusion on

property interests is "slight" and "minimally intrusive."

¶ 120 In any event, the fact is that I-143 did not adjust the regulatory scheme as the amendments over the preceding 83 years had done. Rather, it rendered the regulatory scheme entirely pointless, since none of the businesses in the industry can exist economically after I-143, which was the admitted purpose of the Initiative from the outset.

C. Inapplicability of Police Power/Noxious Use Theory

¶ 121 Citing *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), the State argues that "the government can ban commerce that it deems to be injurious to public health, safety, and welfare without having to compensate the traffickers in such commerce for the loss of their businesses." Likewise, during oral argument, the State emphasized the theory that the Ranchers are not entitled to any compensation because I-143 is "a valid police power regulation" necessary for the protection of the public health, safety, and welfare. The State asserted on this basis that this Court has "no choice" but to affirm the District Court's decision.

¶ 122 In rejecting the Ranchers' takings claims, the District Court articulated a similar theory based on *Mugler*:

> The State has the power to determine that certain commerce is injurious to the welfare of the State and its citizens, and to regulate or even outlaw that commerce. The State has done so here with respect to the fee-shooting prohibition in I-143. When the State does so, its actions may injure investment-backed expectations with respect to commerce in the goods at issue without having to pay compensation.

¶ 123 The Court remarks that "ample authority" supports the District Court's reasoning. Opinion, ¶ 75. According to the Court, this "ample authority" demonstrates the State may put an industry completely out of business without having to pay just compensation, so long as the state action was a valid exercise of its police power. Opinion, ¶ 75. In this connection, the Court observes that the activity targeted by I-143 was "'validly deemed to be injurious to public health, safety, and welfare.'" Opinion, ¶ 75 (quoting the District Court's conclusions of law). The Court does not identify what the injurious byproducts of charging a fee to shoot alternative livestock were, but it appears that the Court has the Sportsmen's concerns in mind (i.e., diseases, unethical hunting, and private ownership of game animals), given that the Court refers to these repeatedly throughout its Opinion.

¶ 124 The State insists that *Mugler* is "still viewed as authoritative under modern taking jurisprudence." As authority for this contention, the State cites *Lucas v. South Carolina Coastal Council*, 505

U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), and *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). In addition, the State asserted during oral argument that *Mugler* "continues to be cited as good law," since "it was cited last term by the Court in the *Kelo* case" – a reference to *Kelo v. City of New London,* 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). A careful reading of *Kelo,* however, reveals that *Mugler* was cited by one of the dissenting Justices, not by the *Kelo* majority. *See Kelo,* 545 U.S. at 519-20, 125 S.Ct. at 2685 (Thomas, J., dissenting).

¶ 125 Although the Ranchers, citing *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed.Cir.1994), and *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed.Cir.1991), argue that *Mugler's* validity is suspect, this debate over *Mugler's* current vitality is beside the point. For the reasons which follow, *Mugler* is inapplicable to the case at hand.

1. The *Mugler* Decision

¶ 126 At the outset, it is necessary to point out that *Mugler,* which involved a challenge to certain Kansas statutes, was decided on substantive due process grounds. The Fifth Amendment's Takings Clause was not at issue for the simple reason that, under the law at the time, the Clause was understood as "intended solely as a limitation on the exercise of

power by the government of the United States, and . . . not applicable to the legislation of the states." *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243, 250-51, 8 L.Ed. 672 (1833); *accord Pumpelly v. Green Bay & Mississippi Canal Co.,* 80 U.S. (13 Wall.) 166, 176-77, 20 L.Ed. 557 (1872). Rather, during the period in which *Mugler* was decided, the "just compensation" requirement (as applied to state action) was a matter of state constitutional law, natural law, common law, and Fourteenth Amendment due process. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight,* 1996 Utah L.Rev. 1211, 1229, 1270-76; Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 Minn. L.Rev. 826, 847-49 (2006); *see also Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226, 236, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897).

¶ 127 The question in *Mugler* was whether state statutes prohibiting the manufacture and sale of intoxicating liquors (except for medical, scientific, and mechanical purposes) violated the Fourteenth Amendment's Due Process Clause or Privileges and Immunities Clause. *See Mugler,* 123 U.S. at 657, 8 S.Ct. at 295. In answering this question, the Supreme Court first acknowledged the power of the States, known as the "police power," "to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights

secured by the Constitution of the United States." *Mugler,* 123 U.S. at 659, 8 S.Ct. at 296. The Court decided that the power to regulate or prohibit the manufacture and sale of intoxicating liquors, whether for general use or merely personal use, was within the ambit of the state's police powers. *See Mugler,* 123 U.S. at 658-63, 8 S.Ct. at 295-98.

¶ 128 Next, the Court considered and rejected the contention that Kansas was required under the Fourteenth Amendment to pay just compensation for the resulting devaluation of the appellants' breweries. *See Mugler,* 123 U.S. at 664-70, 8 S.Ct. at 298-301. The Court reasoned that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler,* 123 U.S. at 665, 8 S.Ct. at 299. Thus, where a particular use of property is a nuisance to the surrounding community, the government may exercise its police power to abate the nuisance. *Mugler,* 123 U.S. at 667, 8 S.Ct. at 300. In explaining that no compensation is required in that situation, the Court stated as follows:

> The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of

> their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Mugler, 123 U.S. at 669, 8 S.Ct. at 301.

2. *Mugler's* Inapplicability to the Case at Hand

¶ 129 Seen in its historical context, *Mugler* stands for the limited proposition that the government need not pay compensation when it exercises its power to prohibit a "noxious" use of property, i.e., a use akin to a "public nuisance." *See Lucas,* 505 U.S. at 1010, 1022-23, 1029-30, 112 S.Ct. at 2890, 2896-97, 2900-01 (explaining that the Takings Clause does not require compensation when the state exercises its power to abate a nuisance which affects the public generally). This is so because the right to engage in the noxious use was never in the property owner's title to begin with; thus, nothing is taken when the state prohibits that use. *See Lucas,* 505 U.S. at 1029-30, 112 S.Ct. at 2900-01. But this proposition gets the State nowhere in its attempt to avoid paying

compensation for the Ranchers' losses. Alternative livestock ranching, which was done and maintained under the express authority of Title 87, chapter 4, part 4, MCA, was in no way a public nuisance. *See* § 27-30-101(2), MCA ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."). *Mugler,* therefore, is inapposite.

¶ 130 The State suggested otherwise at oral argument, asserting emphatically and with unmistakable disdain that use of alternative livestock for the purpose of fee shooting threatened the public health, safety, and welfare. Likewise, in its appellate brief, the State disparages the Ranchers' activities as "injurious to public health, safety, and welfare." That the State would describe alternative livestock ranching with such smug intolerance is astounding, given that the State not only sanctioned the industry's existence for 83 years but also facilitated – and even encouraged – the establishment of numerous alternative livestock businesses. Indeed, the State conceded at oral argument that "[t]here is some evidence to suggest that it was the policy of the political branches of government to encourage people to look at game farming as an alternative to traditional agriculture – actually, to subsidize traditional agriculture so they could stay on the farms and ranches." Yet, at the same time, the State argued that the very activities it had sanctioned and encouraged for 83 years needed to be prohibited in the interest of the public health, safety, and welfare. This is hypocrisy personified.

¶ 131 The State's condemnation of the alternative livestock industry as some sort of noxious or abhorrent threat to the public health, safety, and welfare rings hollow in light of the State's role in creating, developing, and nurturing the industry in the first place. That said, any suggestion that no compensation is owed the Ranchers because the State was abating some sort of public nuisance is legally unsustainable. Section 27-30-101(2), MCA. For that matter, the State has provided nothing but conclusory assertions that alternative livestock ranching constituted a public nuisance in the first place.

¶ 132 On a related point, as noted above, the District Court reasoned:

> The State has the power to determine that certain commerce is injurious to the welfare of the State and its citizens, and to regulate or even outlaw that commerce. The State has done so here with respect to the fee-shooting prohibition in I-143. When the State does so, its actions may injure investment-backed expectations with respect to commerce in the goods at issue without having to pay compensation.

¶ 133 This reasoning is legally unsustainable. Assuming, arguendo, that I-143 reflects a determination by the State that fee shooting is a noxious use of property, it has long been established that the mere declaration by the government that a certain property or use thereof constitutes a nuisance does not make it so. *See Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497,

505, 19 L.Ed. 984 (1871); *see also Lucas*, 505 U.S. at 1031, 112 S.Ct. at 2901-02. Addressing such a declaration in *Yates*, the Supreme Court observed:

> It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public.

Yates, 77 U.S. at 505; *see also Lawton v. Steele*, 152 U.S. 133, 140, 14 S.Ct. 499, 502, 38 L.Ed. 385 (1894) ("[T]he legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so.").

¶ 134 After 83 years of sanctioning alternative livestock ranching, it appears that the State has now decided that this activity is a noxious use of property. However, declaring it to be so does not retroactively make it so. The State may not escape paying just compensation for the Ranchers' losses through the

mere expedient of declaring that which formerly was *not* a public nuisance to have been a public nuisance all along.

3. Undertone about Alternative Livestock Ranchers

¶ 135 One final point must be made before concluding this discussion. There exists in the State's and the Sportsmen's briefs, and in the Court's Opinion as well, an undertone that alternative livestock ranchers are bad people who were engaged in an offensive business and deserved to be shut down. This undertone is not properly a part of the takings calculus. Montana has many businesses that strike some citizens as ill-advised or repugnant for one reason or another. Adult bookstores, strip clubs, bars, and casinos are obvious examples, though tobacco companies, insurance companies, oil companies, and power companies are also viewed by many with contempt. Though regulated, we tolerate the existence of businesses and activities that offend some segments of the population as the price for living in a free-market economy and an open society that values entrepreneurial activity. The fact that an individual's lawful business activity is offensive to some, however, does not itself negate the requirement that the State pay just compensation for taking that individual's property.

D. Misplaced Reliance on Due Process Considerations

¶ 136 The foregoing discussion leads into the fourth and final preliminary matter: misplaced reliance on due process considerations. Broadly speaking, the issue we must decide on this appeal is whether the governmental action embodied in I-143 amounted to a "taking" of the Ranchers' property. In answering this question, relevant considerations include "the actual burden imposed on property rights" and "how that burden is allocated." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543, 125 S.Ct. 2074, 2084, 161 L.Ed.2d 876 (2005). In contrast, whether I-143 "substantially advances legitimate state interests" or is "reasonably necessary to the effectuation of a substantial public purpose" is irrelevant, since such considerations are pertinent to a due process analysis, not a takings analysis. *See Lingle*, 544 U.S. at 540-42, 125 S.Ct. at 2082-84.

¶ 137 Although the Sportsmen acknowledge that due process tests have "no proper place" in takings analysis, they embark on a lengthy discussion about the legitimacy of I-143, arguing that it is "vital" to the protection of Montana's wildlife and to the tradition of fair-chase hunting. Indeed, the Sportsmen consume roughly a third of their appellate brief expounding on "I-143's purposes and the importance of those purposes." The Sportsmen conclude that the "weighty" and "important" purposes served by I-143 "tip the scales" against the State's having to

pay compensation for any diminution in the value of the Ranchers' property.

¶ 138 Similarly, the State acknowledges that due process precedents "are not especially helpful" in resolving the Ranchers' takings claims. Nevertheless, the State contends that I-143 is "a valid police power regulation that substantially advances a number of important interests." Likewise, the District Court observed that I-143 is "a valid police power regulation that reasonably advances the protection of the health, safety, and welfare of the State and its citizens" and that "[t]he State introduced unrebutted evidence that I-143 advances substantial state interests." The District Court concluded that these factors "weigh heavily against requiring the State to pay compensation here."

¶ 139 That the Sportsmen, the State, and the District Court have emphasized these sorts of considerations in their respective analyses is not surprising, given that the Supreme Court long analyzed takings claims under substantive due process principles. Such considerations, however, are not instructive of whether property has been taken; indeed, they are completely irrelevant. Thus, as the Ranchers correctly point out, it is improper (for purposes of analyzing their takings claims) to conduct a "means-ends" analysis of I-143 and the District Court, therefore, erred in factoring due process considerations into its analysis. To understand why, it is helpful to begin with some historical background.

1. Nineteenth Century Regulatory Takings

¶ 140 Contrary to the Court's assertion in ¶ 67, the notion of a regulatory taking – where the government regulates private property rights, as opposed to condemning or directly appropriating private property – was recognized in this country long before 1922. Indeed, recognition of this sort of taking may be found in the 19th century decisions of numerous state courts and even the Supreme Court. *See generally* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight,* 1996 Utah L.Rev. 1211; Andrew S Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U.L.Rev. 181, 228-38 (1999); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights,* 88 Cornell L.Rev. 1549 (2003); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine,* 75 U. Colo. L.Rev. 497, 519-33 (2004).

¶ 141 The Court insists that its contrary version of history is "both historically accurate and well-established." Opinion, ¶ 67 n. 8. Yet, tellingly, the Court fails to produce one single shred of historical authority to back up this claim. Rather, the Court merely cites the same demonstrably incorrect historical accounts that the scholars ably refute in their respective articles cited above. The Court apparently fails to recognize that "[the Supreme] Court's opinions frequently make assertions of historical fact, but those assertions are not authoritative as to history

in the same way that [the Supreme Court's] interpretations of laws are authoritative as to them." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 106 n. 5, 116 S.Ct. 1114, 1148 n. 5, 134 L.Ed.2d 252 (1996) (Souter, Ginsburg, & Breyer, JJ., dissenting). Moreover, that the Supreme Court has "repeated [a] mistake does not transform error into truth." *Dickerson v. United States,* 530 U.S. 428, 460, 120 S.Ct. 2326, 2345, 147 L.Ed.2d 405 (2000) (Scalia & Thomas, JJ., dissenting). If the origins of regulatory takings doctrine is critical to the Court's analysis – and footnote 8 of the Opinion seems to suggest that it is – then it is curious that the Court would ignore authority which plainly refutes its statements in this regard. Not wanting to expend an inordinate amount of time on this point, I note just four of the cases here. Others are discussed in the articles cited above.

¶ 142 At issue in *People v. Platt,* 17 Johns. 195 (N.Y.Sup.1819), were statutes that required the owners of dams on certain rivers to alter the dams so that salmon could pass freely over them. Platt, who owned a milldam across a nonnavigable river that flowed through his property, refused to make the required alterations. In considering the case, the court first observed that Platt had a "right to the exclusive enjoyment of the river" within the bounds of his property. *Platt,* 17 Johns. at 212. The court acknowledged that the legislature had the power to take property for public purposes, but the court reasoned that such appropriations "are constitutional, legal, and justifiable, only when a fair and just

equivalent is awarded to the owner of property thus taken." *Platt,* 17 Johns. at 215. Here, the court observed, "no equivalent is offered, or provided, for the loss which must inevitably ensue, upon a compliance with the requirements of the statutes." *Platt,* 17 Johns. at 215. Thus, because the statutes interfered with the usage rights associated with Platt's riparian property, the court held the statutes were void as applied to him, absent payment of compensation.

¶ 143 In *Woodruff v. Neal,* 28 Conn. 165 (1859), the defendant impounded the plaintiff's cow, which had been grazing along a public highway that passed through the defendant's land. The plaintiff claimed he had the right to depasture his cow along the highway by virtue of a government-issued license authorizing neat cattle to go at large. The court, however, observed that a highway is an easement conferring on the public only a right of passage and that the landowner retains the fee and "all rights of property" in the land. *Woodruff,* 28 Conn. at 167. Among the retained rights, the court noted, was that of "the herbage of the land, which belongs exclusively to him, and having himself thus the right to depasture it, he may maintain trespass against any one who puts his cattle upon it to graze." *Woodruff,* 28 Conn. at 167. Accordingly, in the absence of compensation to the owner of the land upon which the plaintiff's license was to be exercised, the court held that granting the license was "beyond the constitutional power of the legislature." *Woodruff,* 28 Conn. at 169. Notably, a

government-authorized permanent physical invasion of another's private property is now recognized as one of "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle,* 544 U.S. at 538, 125 S.Ct. at 2081 (citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking)).

¶ 144 Lastly, *Walker v. Shepardson,* 4 Wis. 486 (1855), and *Yates v. Milwaukee,* 77 U.S. (10 Wall.) 497, 19 L.Ed. 984 (1871), involved a wharf that extended from Yates's lot into the Milwaukee River. Under Wisconsin law, a riparian proprietor bounded by a navigable stream owned the land to the center of the stream, subject to a public easement to use the stream for navigation. *See Walker,* 4 Wis. at 508. Furthermore, he had "the right to use [his] land which is covered by the water of the river, in any way compatible with the use of the stream for the purposes of navigation," including constructing docks or landing places for goods or passengers. *Walker,* 4 Wis. at 508-09. The City of Milwaukee, however, established a dock line which, as it passed in front of Yates's lot, was 100 feet away from the navigable channel of the river. In other words, the City prohibited Yates from maintaining a dock over that part of his land between the dock line and the navigable part of the river, though a dock in this location would not have interfered with the public's easement. In so

doing, the City rendered this section of his property worthless, and the court held that "it would be necessary to make compensation to the owner for the property which would thus be rendered valueless by this act of the common council." *Walker,* 4 Wis. at 512; *cf. Lingle,* 544 U.S. at 538, 125 S.Ct. at 2081 (a regulation that completely deprives an owner of "*all* economically beneficial use" of her property is a per se taking (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992))).

¶ 145 The City then declared Yates's wharf to be a nuisance and ordered its abatement. *See Yates,* 77 U.S. at 505. The case eventually reached the Supreme Court, which held that the mere declaration that Yates's wharf is a nuisance does not make it so. *Yates,* 77 U.S. at 505. More pertinent to the present discussion are the Supreme Court's statements respecting Yates's entitlement to compensation. In particular, the Court observed that among "the rights of a riparian proprietor whose land is bounded by a navigable stream" are "access to the navigable part of the river from the front of his lot" and "the right to make a landing, wharf or pier for his own use or for the use of the public." *Yates,* 77 U.S. at 504. This "riparian right," the Court observed,

> is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner

> can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Yates, 77 U.S. at 504. Thus, the Supreme Court held that if the City creates a dock line which "deprive[s] riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose," compensation is required. *Yates,* 77 U.S. at 505, 507. Notably, the following year, the Supreme Court reaffirmed "that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." *Pumpelly v. Green Bay & Mississippi Canal Co.,* 80 U.S. (13 Wall.) 166, 179, 20 L.Ed. 557 (1872).

¶ 146 In sum, 19th century courts recognized what we now think of as "regulatory takings" of property, and the assertion that these are a "modern" phenomenon (Opinion, ¶ 67) is simply wrong. Indeed, none of the foregoing cases involved "physical invasion or outright appropriation" by the government (Opinion, ¶ 67).

¶ 147 As an aside, it is interesting that the "bundle-of-sticks" conception of property – i.e., the view that "property" is a bundle of discrete rights associated with a thing, such as the rights of usage, exclusion, alienation, access, and alteration – was

frequently seen in the cases of this period. *See* Kobach, 1996 Utah L.Rev. at 1236, 1252. Each discrete right was protected to the same degree as the next. Moreover, in determining whether a state action constituted a compensable taking, courts which adhered to this conception of property, "imposed neither a threshold dollar value for the total injury nor a minimum percentage by which the entire property had to be devalued. Instead, a much simpler rule seemed to underlie their opinions: if *any* discrete stick in the bundle was taken, compensation was required." Kobach, 1996 Utah L.Rev. at 1252.

2. The Supreme Court's Substantive Due Process Approach

¶ 148 As touched on in the discussion of police power/noxious use theory above, the Supreme Court during the last quarter of the 19th century analyzed regulatory takings claims against the States under the Fourteenth Amendment's Due Process Clause. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 Minn. L.Rev. 826, 847-50 (2006); *see also* Kobach, 1996 Utah L.Rev. at 1276-85 (explaining that in *Railroad Co. v. Richmond,* 96 U.S. 521, 24 L.Ed. 734 (1878), *Transportation Co. v. Chicago,* 99 U.S. 635, 25 L.Ed. 336 (1879), *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), and *Scranton v. Wheeler,* 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126 (1900), the Supreme Court "retreated" from the takings doctrine it had enunciated in *Yates* and

Pumpelly). The analysis turned centrally on whether the challenged regulation fell within the legitimate bounds of the state's police power, since that power was viewed as an inherent limitation on state-law property rights. In other words, if the regulation was a legitimate exercise of the police power, no compensation was required for the simple reason that no deprivation of property had occurred. *See* Karkkainen, 90 Minn. L.Rev. at 830-31, 838-42; *see also e.g. Powell v. Pennsylvania,* 127 U.S. 678, 683-87, 8 S.Ct. 992, 995-97, 32 L.Ed. 253 (1888); *Chicago, Burlington & Quincy Railroad Co. v. Chicago ("Chicago, B & Q"),* 166 U.S. 226, 252, 17 S.Ct. 581, 590-91, 41 L.Ed. 979 (1897). The Court followed this approach well into the 20th century.[2] *See e.g. Atlantic*

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[2] *Chicago, B & Q* has been cited as the case in which the protections of the Fifth Amendment's Takings Clause were made applicable to the States through the Fourteenth Amendment. *See e.g. Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978); *Dolan v. City of Tigard,* 512 U.S. 374, 383-84, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994). However, *Chicago, B & Q* contains no mention of either the Takings Clause or the Fifth Amendment. Rather, the case was decided on substantive due process grounds. The Supreme Court held that the Fourteenth Amendment's Due Process Clause "requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State." *See Chicago, B & Q,* 166 U.S. at 235-41, 17 S.Ct. at 584-86; *see also Dolan,* 512 U.S. at 405-06, 114 S.Ct. at 2326-27 (Stevens, Blackmun, & Ginsburg, JJ., dissenting). This compensation requirement derived from "universal law" and "natural equity," not the Fifth Amendment. *See Chicago, B & Q,* 166 U.S. at 236, 17 S.Ct. at 584; Karkkainen, 90 Minn. L.Rev. at 829-30. In his article, Professor Karkkainen

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Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558-59, 34 S.Ct. 364, 368, 58 L.Ed. 721 (1914); *New Orleans Public Service, Inc. v. New Orleans,* 281 U.S. 682, 687, 50 S.Ct. 449, 450, 74 L.Ed. 1115 (1930); *Goldblatt v. Hempstead,* 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130 (1962); *but see Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) ("When this seemingly absolute protection [of private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.").

¶ 149 The line which separated legitimate from illegitimate exercises of the police power, in turn, hinged on the following: whether the regulation was in some way designed to promote the health, safety, or welfare of the community; whether the means employed had a real and substantial relation to the avowed or ostensible purpose of the regulation; and whether the interference with private rights was not wanton or arbitrary. *See e.g. Mugler,* 123 U.S. at 661, 8 S.Ct. at 297; *Lawton v. Steele,* 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894); *Dobbins v. Los Angeles,* 195 U.S. 223, 238-39, 25 S.Ct. 18, 21, 49

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persuasively demonstrates that it was not until 1978, in *Penn Central,* that the Supreme Court first explicitly held the Takings Clause applicable to the States. *See* Karkkainen, 90 Minn. L.Rev. at 838-78.

L.Ed. 169 (1904); *St. Louis, Iron Mt. & S. Ry. Co. v. Wynne,* 224 U.S. 354, 359-60, 32 S.Ct. 493, 494, 56 L.Ed. 799 (1912); *Atlantic Coast Line,* 232 U.S. at 559, 34 S.Ct. at 368; *Reinman v. Little Rock,* 237 U.S. 171, 176-77, 35 S.Ct. 511, 513, 59 L.Ed. 900 (1915); *Hadacheck v. Sebastian,* 239 U.S. 394, 410, 36 S.Ct. 143, 145, 60 L.Ed. 348 (1915); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387, 395, 47 S.Ct. 114, 118, 121, 71 L.Ed. 303 (1926); *Miller v. Schoene,* 276 U.S. 272, 279-80, 48 S.Ct. 246, 247-48, 72 L.Ed. 568 (1928); *Nectow v. Cambridge,* 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928); *Goldblatt,* 369 U.S. at 594-95, 82 S.Ct. at 990.

3. *Penn Central's* Conflation of Doctrines

¶ 150 Meanwhile, during this same period, the Fifth Amendment's Takings Clause operated as a parallel and similar, but nonetheless distinct and independent strand of constitutional doctrine, with its own canonical precedents. *See* Karkkainen, 90 Minn. L.Rev. at 855-61 (and cases discussed therein). In *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), however, the Supreme Court collapsed its substantive due process and takings precedents into a single Fifth Amendment regulatory takings test applicable to both state and federal actions, thereby creating a "muddle." *See* John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion,* 17 Vt. L.Rev. 695,

695-703 (1993). The Court articulated a number of factors that it considered pertinent under this test, including the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, the character of the governmental action, and whether the regulation has an unduly harsh impact upon the owner's use of the property. *Penn Central,* 438 U.S. at 124, 127, 98 S.Ct. at 2659, 2660-61. In addition, the Court retained the fundamental precepts of substantive due process doctrine. *See Penn Central,* 438 U.S. at 125-27, 98 S.Ct. at 2659-61 (discussing or citing, among others, *Nectow, Euclid, Miller, Hadacheck, Reinman, Mugler*, and *Goldblatt*). In particular, the Court reaffirmed that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central,* 438 U.S. at 127, 98 S.Ct. at 2660. Ultimately, the Court concluded that the regulation at issue (New York City's Landmarks Preservation Law) had not effected a taking of the appellants' property because "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Penn Central,* 438 U.S. at 138, 98 S.Ct. at 2666.

¶ 151 As a conflation of substantive due process and takings doctrines, the *Penn Central* inquiry

necessarily reflected elements of both. Two years later, in *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the Supreme Court summarized the takings inquiry as follows: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins,* 447 U.S. at 260, 100 S.Ct. at 2141 (citing *Nectow,* 277 U.S. at 188, 48 S.Ct. at 448, and *Penn Central,* 438 U.S. at 138 n. 36, 98 S.Ct. at 2666 n. 36). The "substantially advances" prong of this test was repeated in numerous subsequent cases, *see Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 704, 119 S.Ct. 1624, 1636, 143 L.Ed.2d 882 (1999) (citing cases), and remained in place for the next 25 years.

4. *Lingle's* Clarifications

¶ 152 In *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), the Supreme Court jettisoned the "substantially advances" formulation. The Court observed that the Takings Clause was designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper* interference amounting to a taking. *Lingle,* 544 U.S. at 537, 125 S.Ct. at 2080. With respect to regulatory takings, the Court framed the dispositive question as whether the regulation is "so onerous that its effect is tantamount to a direct

appropriation or ouster." *Lingle,* 544 U.S. at 537, 125 S.Ct. at 2081. To answer this question, the Court explained, courts must focus on "the severity of the burden that government imposes upon private property rights." *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082.

¶ 153 The "substantially advances" formula, however, suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. *Lingle,* 544 U.S. at 542, 125 S.Ct. at 2083. Of course, this is the due process inquiry the Court had long applied when analyzing regulatory takings claims against the States under the Fourteenth Amendment. In *Lingle,* however, the Court made clear that this sort of inquiry is ineffective for discerning whether private property has been "taken" for purposes of the Fifth Amendment:

> [T]he "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.
>
> . . .

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use.*" It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." Conversely, if a government action is found to be impermissible – for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle, 544 U.S. at 542-43, 125 S.Ct. at 2084 (citation omitted).

¶ 154 *Lingle,* therefore, is an important clarification of federal regulatory takings law. The critical focus in a regulatory takings case is on the severity of the burden a particular regulation imposes on private property rights and how that regulatory burden is distributed among property owners. The due process and means-ends considerations that had informed the Court's prior decisions are no longer appropriate measures of whether a taking has occurred.

¶ 155 It is also important to note here that in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the Supreme Court explicitly rejected the notion that a valid police power regulation never requires compensation to the owner. The Court observed that there are "limits to the noncompensable exercise of the police power." *Lucas,* 505 U.S. at 1026, 112 S.Ct. at 2899. Otherwise, if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas,* 505 U.S. at 1014, 112 S.Ct. at 2892-93 (brackets in *Lucas*) (quoting *Mahon,* 260 U.S. at 415, 43 S.Ct. at 160).

5. Conclusion

¶ 156 The due process considerations pervading the District Court's decision and the Sportsmen's and the State's respective arguments may be understood in light of the many Supreme Court precedents which analyze regulatory takings claims using due process principles. However, such considerations are misplaced in light of *Lingle.* The Ranchers are not precluded from recovering for a constitutional taking simply because the State was exercising its police powers, or because I-143 substantially advances legitimate state interests. Indeed, we assume going into the takings analysis that the governmental actions embodied in I-143 are valid, and the central question

we address is whether I-143 is "so onerous that its effect is tantamount to a direct appropriation or ouster." *See Lingle,* 544 U.S. at 537, 543, 125 S.Ct. at 2081, 2084.

III. ANALYSIS OF THE RANCHERS' TAKINGS CLAIMS

A. The Basis of the Ranchers' Claims

¶ 157 The Ranchers filed this action against the State, and the Sportsmen intervened as defendants a month later. The Ranchers challenged I-143 on various grounds, including due process and equal protection, and they sought declaratory and injunctive relief. In the alternative, if I-143 were found to be constitutional and enforceable against them, the Ranchers sought just compensation for a regulatory taking of their property. The Ranchers, in other words, brought an "inverse condemnation" action.

¶ 158 The phrase "inverse condemnation" is a shorthand description of the manner in which a property owner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. *United States v. Clarke,* 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980). Whereas a condemnation proceeding typically involves an action by the condemnor to acquire title to property, inverse condemnation is an action by the property owner against a governmental defendant to recover the value of property that has been taken,

even though no formal exercise of the power of eminent domain has been attempted by the government. *See Clarke,* 445 U.S. at 257, 100 S.Ct. at 1130; *see also First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). Thus, "inverse condemnation" describes an action that is the "inverse" or "reverse" of a condemnation proceeding. *Clarke,* 445 U.S. at 257, 100 S.Ct. at 1130. "The owner's right to bring such a suit derives from the self-executing character of the constitutional provision with respect to condemnation." *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 5 n. 6, 104 S.Ct. 2187, 2191 n. 6, 81 L.Ed.2d 1 (1984) (internal quotation marks omitted).

¶ 159 Here, the State did not condemn the Ranchers' property through a formal proceeding; rather, the State regulated their property through passage of I-143. As a result, the Ranchers brought an inverse condemnation action to recover for their losses caused by the Initiative. *See Southview Assoc. v. Bongartz,* 980 F.2d 84, 93 n. 3 (2d Cir.1992) ("Essentially, a regulatory taking – also known as inverse condemnation – occurs when the purpose of government regulation and its economic effect on the property owner render the regulation substantively

equivalent to an eminent domain proceeding and, therefore, require the government to pay compensation to the property owner."); Julius L. Sackman, *Nichols on Eminent Domain* vol. 2A, § 6.03 [1], 6-182 (3d ed., Matthew Bender 2006) ("[S]ome regulatory or other activities may effect a taking, necessitating that owners bring inverse condemnation proceedings against the government.").

B. The Constitutional Basis for Our Decision

¶ 160 The Ranchers seek relief under the Fifth Amendment to the United States Constitution and Article II, Section 29 of the Montana Constitution. Yet, while the Court's decision purports to rest on both of these provisions, *see* Opinion, ¶¶ 29, 54, 63, 65, and while the Court acknowledges that the plain language of the two provisions differs, Opinion, ¶ 30 – indeed, the language of Article II, Section 29 is facially broader than the language of the Fifth Amendment – the Court nevertheless offers no independent interpretation of Article II, Section 29. Quite to the contrary, the Court decides to follow "our previous approach of looking towards federal jurisprudence when considering takings claims under Montana law." Opinion, ¶ 31. In so doing, the Court equates the Ranchers' claims under the Fifth Amendment with the Ranchers' claims under Article II, Section 29.

¶ 161 The Court offers a singularly unpersuasive explanation for this approach: "[The Ranchers] rely almost exclusively on federal case law." Opinion, ¶ 31. That, however, is hardly a justification for treating a claim brought under a facially broader provision of the Montana Constitution as no different from a claim brought under the provision's counterpart in the United States Constitution. Moreover, if it seems that the Ranchers are relying "almost exclusively" on federal caselaw, it is because there is very little, if any, Montana caselaw on point. And this jurisprudential void is not likely to be filled when this Court persists in the utterly circular and self-perpetuating syllogism: because this Court in the past has looked to federal caselaw for guidance when considering takings claims, the Ranchers have relied on federal caselaw in support of their position, and because the Ranchers have relied on federal caselaw in support of their position, we will look to federal caselaw in considering their takings claims.

¶ 162 Of course, "[i]t is perfectly proper for us to use criteria developed in federal cases" when state law is silent or lacking. *Pfost v. State*, 219 Mont. 206, 216, 713 P.2d 495, 501 (1985), *overruled on other grounds, Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 26, 776 P.2d 488, 491 (1989). It is also proper for us to rely on federal jurisprudence as persuasive authority. But there is a vast difference between looking to federal law for guidance and allowing federal-court decisions to dictate the meaning and substance of Montana's Constitution. Unfortunately, in the case at

hand, the Court has done the latter by conflating the Ranchers' federal and state constitutional claims into one.

¶ 163 It would be one thing if the Court simply refused to reach the Ranchers' claims under Article II, Section 29 on the ground that they had failed to raise it adequately. *See e.g. State v. Garrymore,* 2006 MT 245, ¶¶ 38-39, 334 Mont. 1, ¶¶ 38-39, 145 P.3d 946, ¶¶ 38-39 (concluding that Garrymore's argument under Article II, Sections 24 and 26 was "too undeveloped to undertake a distinctive application of state constitutional principles"); *State v. Rosling,* 2008 MT 62, ¶ 66, 342 Mont. 1, ¶ 66, 180 P.3d 1102, ¶ 66 (same). But that is not what the Court does. Rather, notwithstanding the Ranchers' reliance "almost exclusively" on federal caselaw and the Ranchers' corresponding failure to develop their theory of relief under the Montana Constitution to the Court's satisfaction – the exact situation we faced in *Garrymore* and *Rosling* – the Court proceeds to issue a decision that likewise relies almost exclusively on Fifth Amendment cases but is grounded, in part, on Article II, Section 29. This equating of the two constitutional provisions is regrettable, not only because it denigrates our own Constitution and renders Article II, Section 29 little more than a constitutional redundancy, but also because it is totally unnecessary. If the Ranchers are to be faulted for failing to cite precedents under Article II, Section 29 to the Court's satisfaction, then their claims should be resolved under M.R.App. P. 12(1)f., not by

conflating their federal and state constitutional claims into one.

¶ 164 According to the State, the Ranchers "conceded in the court below that the reach of the Taking Clause under the Fifth Amendment and the protection from uncompensated takings found in Article II, Section 29 of the Montana Constitution are co-extensive." As support for this assertion, the State directs us to the following statement by the Ranchers in one of their District Court filings: "The Montana Supreme Court is generally in accord with federal case law on the analysis of takings." (The Court refers to this statement as well. *See* Opinion, ¶ 31.) This, however, is hardly the concession the State makes it out to be. The Ranchers did not "concede" that the protections of the Fifth Amendment and Article II, Section 29 are "co-extensive." They merely offered a candid acknowledgement of this Court's past approach, which is to "look[ ] towards federal jurisprudence when considering takings claims under Montana law" (Opinion, ¶ 31). More importantly, this supposed concession that the protections of the Fifth Amendment and Article II, Section 29 are "co-extensive" does not establish that they are so. This Court, not the Ranchers, determines the "reach" of Article II, Section 29.

¶ 165 We have recognized that the provisions of Article II are "separate and enforceable constitutional rights insofar as the jurisdiction of the State of Montana extends." *Madison v. Yunker*, 180 Mont. 54, 60, 589 P.2d 126, 129 (1978). We have also said that

"we will not reach a federal constitutional challenge unless and until the case may not be resolved on adequate and independent state grounds." *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 325, 730 P.2d 380, 384 (1986). Along these same lines, we have stated that where the constitutionality of a governmental act affecting property rights is attacked under both the United States Constitution and the Montana Constitution, "we believe it to be our duty, irrespective of the holdings of other courts, to consider and apply the provisions of our own Constitution and general statutes thereto, and declare the rule of property for Montana." *Gas Products Co. v. Rankin*, 63 Mont. 372, 388, 207 P. 993, 997-98 (1922). Finally, when interpreting provisions of Article II, we have long refused to march lockstep with the United States Supreme Court's pronouncements concerning similar provisions of the federal constitution.[3]

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[3] *See e.g. Walker v. State*, 2003 MT 134, ¶ 73, 316 Mont. 103, ¶ 73, 68 P.3d 872, ¶ 73 (holding that Article II, Sections 4 and 22 provide greater protection than the Eighth Amendment); *State v. Guillaume*, 1999 MT 29, ¶ 16, 293 Mont. 224, ¶ 16, 975 P.2d 312, ¶ 16 (holding that Article II, Section 25 provides greater protection than the Fifth Amendment); *Woirhaye v. District Court*, 1998 MT 320, ¶¶ 6-26, 292 Mont. 185, ¶¶ 6-26, 972 P.2d 800, ¶¶ 6-26 (concluding that Article II, Sections 24 and 26 provide greater protection than the Sixth Amendment); *Gryczan v. State*, 283 Mont. 433, 447-51, 942 P.2d 112, 120-23 (1997) (concluding that Article II, Section 10, provides greater protection than the federal constitution's right to privacy); *Vernon Kills On Top v. State*, 279 Mont. 384, 420-24, 928 P.2d 182, 204-07 (1996) (concluding that Article II, Section 22 provides greater protection than the Eighth Amendment).

¶ 166 For these reasons, our approach in this case should be to address the Ranchers' claims first under the Montana Constitution and then, if necessary, under the United States Constitution. The Court's decision, however, is based entirely on Fifth Amendment jurisprudence. Moreover, although the Ranchers cite Article II, Section 29 as a basis for relief, their corresponding argument is largely undeveloped. *Cf. Garrymore,* ¶¶ 38-39; *Rosling,* ¶ 66. Accordingly, I will analyze the Ranchers' claims under the Fifth Amendment, rather than Article II, Section 29. In so doing, I will also explain my disagreement with the Court's corresponding Fifth Amendment analysis. As for Article II, Section 29, the claim that I-143 effected a taking or damaging of property under the Montana Constitution is better developed by the appellants in the companion case, *Buhmann v. State* (No. 05-473). Therefore, I will address Article II, Section 29 within the context of that case and explain why that provision entitles the *Buhmann* appellants to just compensation.

C. Analytical Framework and Relevant Principles under the Fifth Amendment

¶ 167 The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In analyzing a takings claim in the context of an inverse condemnation action, the court first determines whether the plaintiff possesses a constitutionally protected property interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S.

986, 1000, 104 S.Ct. 2862, 2871, 81 L.Ed.2d 815 (1984); *Huntleigh USA Corp. v. United States,* 525 F.3d 1370, 1377 (Fed.Cir.2008). Whether one has a protected property interest is a question of law. *See Texas State Bank v. United States,* 423 F.3d 1370, 1378 (Fed.Cir.2005). If the plaintiff possesses a protected property interest, the court then determines whether a part or a whole of that interest has been taken for public use, thus entitling the plaintiff to just compensation. *Monsanto,* 467 U.S. at 1000-01, 104 S.Ct. at 2871; *Members of Peanut Quota Holders Ass'n v. United States,* 421 F.3d 1323, 1330 (Fed.Cir.2005). The issue of whether a taking has occurred is a question of law based on factual underpinnings. *Huntleigh,* 525 F.3d at 1377.

¶ 168 With respect to the first question (whether the plaintiff possesses a constitutionally protected property interest), the Constitution protects, but does not create, property interests. *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 164, 118 S.Ct. 1925, 1930, 141 L.Ed.2d 174 (1998). Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Monsanto,* 467 U.S. at 1001, 104 S.Ct. at 2872 (internal quotation marks omitted); *accord Phillips,* 524 U.S. at 164, 118 S.Ct. at 1930. In this regard, the term "property," as used in the Takings Clause, is not restricted to any particular type of property. To the contrary, it encompasses a wide variety of interests. Clearly, it includes real property, personal property,

and intangible property. *Huntleigh,* 525 F.3d at 1377-78. But it also "'denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.'" *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82 n. 6, 100 S.Ct. 2035, 2041 n. 6, 64 L.Ed.2d 741 (1980) (brackets in *PruneYard*) (quoting *United States v. General Motors Corp.,* 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945)). Property interests "are about as diverse as the human mind can conceive," *Florida Rock Industries v. United States,* 18 F.3d 1560, 1572 n. 32 (Fed.Cir.1994), and the Takings Clause is addressed to "every sort of interest the citizen may possess," *General Motors,* 323 U.S. at 378, 65 S.Ct. at 359.

¶ 169 With respect to the second question (whether a part or a whole of the plaintiff's property interest has been taken for public use), the Supreme Court's precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes: first, where the government requires an owner to suffer a permanent physical invasion of her property, and second, where a regulation completely deprives an owner of all economically beneficial uses of her property. *See Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 538, 125 S.Ct. 2074, 2081, 161 L.Ed.2d 876 (2005) (citing, respectively, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d

798 (1992)). Outside these two relatively narrow categories (and the special context of land-use exactions, which are not at issue here), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *See Lingle,* 544 U.S. at 538, 125 S.Ct. at 2081.

¶ 170 The case at hand does not involve a *Loretto*-type "permanent physical invasion" claim, but the Ranchers do make several assertions that could be construed as a *Lucas*-type "total regulatory taking" claim. For instance, the Kafkas assert that after I-143, there was "no economically viable use" of their alternative livestock and that the fair market value of their licenses and businesses "went to zero." Likewise, citing *Lucas,* the Bridgewaters and the Boumas assert that passage of I-143 "destroyed the beneficial use" of their property and "effectively left it economically idle." The Court also perceives a *Lucas*-based theory in the Ranchers' arguments, noting that "Appellants urge us to . . . correctly apply the *Penn Central* or *Lucas* takings analysis." Opinion, ¶ 36.

¶ 171 At the same time, however, the Kafkas make the dubious pronouncement that "*Lucas* analysis applies to categorical takings of land, not regulatory takings of other property interests." In an unexpected twist, the State counters that "[w]hile *Lucas* on its facts involved a claimed categorical taking of land, the principles explained by the court in its opinion govern in other regulatory taking contexts as well, as exemplified by [*American*

Pelagic Fishing Co. v. United States, 379 F.3d 1363 (Fed.Cir.2004)]." Yet, according to the Kafkas, application of *Lucas* to their regulatory takings claim would be "misguided and erroneous." They contend that "whether the regulation at issue has denied the claimant of the economically viable use of its property" is to be examined under the economic-impact prong of the *Penn Central* test. The Bridgewaters and the Boumas do not go so far as to reject a *Lucas*-based theory outright, but they, like the Kafkas, tie their *Lucas* arguments to their *Penn Central* analysis. Accordingly, given the lack of a distinct *Lucas* – based analysis in the Ranchers' briefs, and given that their Fifth Amendment arguments track the analytical approach set forth in *Penn Central,* I likewise will address their regulatory takings challenge under *Penn Central's* standards.

¶ 172 Two fundamental principles underlie the Supreme Court's regulatory takings jurisprudence. The first is Justice Holmes' proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). The second is Justice Black's articulation of the purpose of the Takings Clause: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*

v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). These two principles are cited time and again in the Supreme Court's contemporary takings cases.[4]

¶ 173 The Supreme Court has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central,* 438

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[4] *See e.g. Penn Central,* 438 U.S. at 123, 98 S.Ct. at 2659; *PruneYard,* 447 U.S. at 82-83, 100 S.Ct. at 2041-42; *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980); *Williamson County Regional Planning Com'n v. Hamilton Bank,* 473 U.S. 172, 197-98, 105 S.Ct. 3108, 3122, 87 L.Ed.2d 126 (1985); *Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 227, 106 S.Ct. 1018, 1027, 89 L.Ed.2d 166 (1986); *Hodel v. Irving,* 481 U.S. 704, 718, 107 S.Ct. 2076, 2084, 95 L.Ed.2d 668 (1987); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 316, 318-19, 107 S.Ct. 2378, 2386, 2388, 96 L.Ed.2d 250 (1987); *Bowen v. Gilliard,* 483 U.S. 587, 608, 107 S.Ct. 3008, 3021, 97 L.Ed.2d 485 (1987); *Nollan v. California Coastal Com'n,* 483 U.S. 825, 835 n. 4, 107 S.Ct. 3141, 3148 n. 4, 97 L.Ed.2d 677 (1987); *Pennell v. San Jose,* 485 U.S. 1, 9, 108 S.Ct. 849, 856, 99 L.Ed.2d 1 (1988); *Yee v. Escondido,* 503 U.S. 519, 529, 112 S.Ct. 1522, 1529, 118 L.Ed.2d 153 (1992); *Lucas,* 505 U.S. at 1014-15, 112 S.Ct. at 2893; *Dolan v. City of Tigard,* 512 U.S. 374, 384, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994); *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 734, 117 S.Ct. 1659, 1665, 137 L.Ed.2d 980 (1997); *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 702, 119 S.Ct. 1624, 1635, 143 L.Ed.2d 882 (1999); *Palazzolo v. Rhode Island,* 533 U.S. 606, 617-18, 121 S.Ct. 2448, 2457-58, 150 L.Ed.2d 592 (2001); *Lingle,* 544 U.S. at 537, 125 S.Ct. at 2080, 2081.

U.S. at 124, 98 S.Ct. at 2659; *accord Lingle,* 544 U.S. at 538, 125 S.Ct. at 2081. Indeed, except for the two per se categories identified above (permanent physical invasion, and complete deprivation of all economically beneficial use), the Court has "'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in '"essentially ad hoc, factual inquiries."'" *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 326, 122 S.Ct. 1465, 1481, 152 L.Ed.2d 517 (2002) (quoting *Lucas,* 505 U.S. at 1015, 112 S.Ct. at 2893, in turn quoting *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659).

¶ 174 Nevertheless, in *Penn Central,* the Supreme Court identified "several factors that have particular significance" in conducting these "ad hoc, factual inquiries." *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. The factors include "[t]he economic impact of the regulation on the claimant,""the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. The Supreme Court reaffirmed the *Penn Central* test in *Lingle.*[5] *See Lingle,* 544 U.S. at 538-39, 548, 125 S.Ct. at 2081-82, 2087.

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[5] Incidentally, it is puzzling that the *Lingle* Court, on one hand, unequivocally rejected the due process inquiry articulated in *Agins* but, on the other hand, reaffirmed *Penn Central's* takings test, which itself is steeped in due process doctrine (*see Penn Central,* 438 U.S. at 125-27, 138, 98 S.Ct. at 2659-61,

(Continued on following page)

¶ 175 In applying these factors, we must remain cognizant of the object of this exercise. Thus, it is useful to reiterate some of the clarifications made by the Supreme Court in *Lingle* and discussed in Part II-D-4 of this Dissent. In particular, the ultimate question in a Fifth Amendment regulatory takings analysis is whether the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle,* 544 U.S. at 537, 125 S.Ct. at 2081. To answer this question, each of the Supreme Court's regulatory takings tests "focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082; *see also Lingle,* 544 U.S. at 542, 125 S.Ct. at 2084 (emphasizing "the magnitude or character of the burden a particular regulation imposes upon private property rights"). For example, a permanent physical invasion, however minimal the economic cost it entails, must be compensated because it "eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests." *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082. In the *Lucas* context, compensation is required for the complete elimination of a property's value because " 'total deprivation of beneficial use is, from the landowner's point of view, the

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2666). It is marginally reassuring that in explaining the *Penn Central* test, the *Lingle* Court emphasized the economic impact of the regulation on the plaintiff as one of the "[p]rimary" factors of the test. *See Lingle,* 544 U.S. at 538-39, 125 S.Ct. at 2081-82.

equivalent of a physical appropriation.'" *Lingle,* 544 U.S. at 539-40, 125 S.Ct. at 2082 (quoting *Lucas,* 505 U.S. at 1017, 112 S.Ct. at 2894). And the *Penn Central* inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle,* 544 U.S. at 540, 125 S.Ct. at 2082.

¶ 176 With this framework in mind, I proceed with a Fifth Amendment analysis of the Ranchers' takings claims.

D. Analysis of the Ranchers' Claims under the Fifth Amendment

¶ 177 The Court divides the Ranchers' assets into four categories: alternative livestock ranch licenses, intangible business assets, real estate interests and fixtures, and alternative livestock. The Court explains that "[i]n cases where there is a 'mix' of property interests, it is appropriate, if warranted under the circumstances, to consider those interests separately in a takings analysis." Opinion, ¶ 37. Apparently, separate consideration of property interests is "warranted" in this case because "[t]hat was the approach applied by the District Court." Opinion, ¶ 37. I question whether this is a legally authoritative rationale for the Court's approach. But, for the sake of argument, and because it facilitates a comparison between the Court's reasoning and my own, I will

consider each of the Ranchers' assets under the categories proffered by the Court.

1. The Alternative Livestock Ranch Licenses

¶ 178 At the outset of discussing the Ranchers' alternative livestock ranch licenses, it must be pointed out that the Court's discussion at ¶¶ 38-54 is largely off point. These paragraphs are dedicated to the question of whether a "government-issued license" is a compensable property interest. The Court ultimately answers this question in the negative, at least as far as the Ranchers' licenses are concerned. Opinion, ¶ 54. Yet, I-143 did not revoke the Ranchers' licenses. Indeed, the Ranchers still possess and use their licenses, and they may continue to do so, so long as they pay the annual renewal fee, comply with all recording and reporting requirements, and do not engage in misconduct in operating their ranches. Sections 87-4-412(1), -423(1), -427(1), MCA (2001).

¶ 179 Thus, since the Ranchers still have their licenses, they obviously are not claiming that I-143 took the licenses themselves. What the Ranchers claim, rather, is that I-143 took a particular property interest associated with the licenses – namely, the right to transfer them and, more generally, their businesses. *See* Laws of Montana 2001, 2000 Ballot Issues, Initiative No. 143, § 4 (amending § 87-4-412(2), MCA); § 87-4-412(2), MCA (2001) ("An alternative livestock ranch license for a specific

facility is not transferable."). There can be no doubt that the right to transfer is a compensable property interest. *See Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 500, 107 S.Ct. 1232, 1250, 94 L.Ed.2d 472 (1987) ("[T]he right to sell property [is] . . . one element of the owner's property interest."); *Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (labeling the right to dispose of property – e.g., through commercial transactions – as "one traditional property right" and one "strand" of the "bundle" of property rights an owner possesses); *Conti v. United States,* 291 F.3d 1334, 1341 (Fed.Cir.2002) ("The rights to sell, assign, or otherwise transfer are traditional hallmarks of property."); *Thompson v. Lincoln Nat. Life Ins. Co.,* 114 Mont. 521, 533, 138 P.2d 951, 957 (1943) ("[A]n essential element of the right of private property is the right to use or dispose of it. . . ."); § 70-1-503, MCA ("Property of any kind may be transferred, ...").

¶ 180 I-143 abrogated the Ranchers' ability to sell, assign, or otherwise transfer their businesses by amending § 87-4-412(2), MCA, to prohibit the transfer of their alternative livestock ranch licenses. Accordingly, the actual question here is whether this revocation of the right to transfer constitutes a taking under the *Penn Central* inquiry – an issue the Court conveniently sidesteps by rewriting the Ranchers' claim to be one based on loss of the licenses themselves, rather than loss of the right to transfer the licenses.

¶ 181 In answering this question, the Supreme Court's decision in *Hodel v. Irving,* 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), provides useful guidance. At issue in *Irving* was a regulation requiring certain undivided fractional interests in Indian lands to escheat to the tribe. In conducting its *Penn Central* inquiry, the Supreme Court first concluded that the economic impact of this regulation "can be substantial," given the value of the underlying lands. *Irving,* 481 U.S. at 714, 107 S.Ct. at 2082. Furthermore, the Court observed that "the right to pass on valuable property to one's heirs is itself a valuable right." *Irving,* 481 U.S. at 715, 107 S.Ct. at 2082-83. Thus, even though the owners of the escheatable interests had full beneficial use of their property during their lifetimes, they had lost a valuable right associated with those interests. On the other hand, while some of the owners may have purchased their interests with the expectation that they might pass on the remainder to their heirs at death, most of them had acquired their interests by gift, descent, or devise. Thus, the extent to which they had investment-backed expectations in passing on the property was "dubious." *Irving,* 481 U.S. at 715, 107 S.Ct. at 2083. Also weighing "weakly" in favor of the statute was the "average reciprocity of advantage" – i.e., the fact that consolidation of Indian lands in the tribe benefitted the members of the tribe. *Irving,* 481 U.S. at 715-16, 107 S.Ct. at 2083 (internal quotation marks omitted).

¶ 182 At this point, the Supreme Court noted that if it were to stop its analysis based on the foregoing considerations, "we might well find [the regulation] constitutional. But the character of the Government regulation here is extraordinary." *Irving,* 481 U.S. at 716, 107 S.Ct. at 2083. With reasoning that is pertinent to the Ranchers' loss of transferability, the Court explained:

> In *Kaiser Aetna v. United States,* [444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979)], we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs. In one form or another, the right to pass on property – to one's family in particular – has been part of the Anglo-American legal system since feudal times. . . . Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. . . . Since the escheatable interests are not, as the United States argues, necessarily *de minimis,* nor, as it also argues, does the availability of *inter vivos* transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld.

Irving, 481 U.S. at 716-17, 107 S.Ct. at 2083-84.

¶ 183 Thus, the Supreme Court held that the escheat regulation "'goes too far.'" *Irving,* 481 U.S. at 718, 107 S.Ct. at 2084 (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922)). The Court acknowledged the government's "broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Irving,* 481 U.S. at 717, 107 S.Ct. at 2084. "The difference in this case," the Court explained, "is the fact that both descent and devise are completely abolished." *Irving,* 481 U.S. at 717, 107 S.Ct. at 2084.

¶ 184 Similarly, in the case at hand, the character of the government regulation is extraordinary. I-143 abolished one of the traditional hallmarks of property: the right to transfer. The economic impact of this total abrogation is substantial, given that an alternative livestock ranch license is an integral component of an alternative livestock business. No longer may the Ranchers sell, assign, or otherwise transfer their businesses. In this connection, the Bridgewaters point out that prior to the passage of I-143, they received an offer of $4 million to buy their operation. Following passage, however, the offer was withdrawn, in large part because the license could not be transferred. Under *Irving,* these factors alone dictate that the Ranchers' right to transfer has been taken.

¶ 185 Notably, the State might have precluded this issue from arising had it continued to prohibit the transfer of alternative livestock ranch licenses. In

that scenario, a participant in the industry would have been hard-pressed to claim an investment-backed expectation in being able to transfer her license and business. But in 1993, the Legislature granted the right to transfer the licenses. *See* Laws of Montana 1993, ch. 315, § 6 (substituting "[a] game farm license for a specific facility is transferable" for "[a] game farm license is nontransferable" in § 87-4-412, MCA, effective April 12, 1993). The Bridgewaters entered into the alternative livestock business in 1992 and thereafter invested in improvements uniquely designed for operating an alternative livestock business on their property. The Kafkas and the Boumas began investing in their respective operations in 1996. All of the Ranchers had reasonable expectations that they would be able to sell, assign, or otherwise transfer their businesses. These investment-backed expectations bolster the conclusion that the Ranchers have suffered a taking.

¶ 186 Before concluding this discussion, I pause to address several facets of the Court's approach. Although I consider the Court's analysis at ¶¶ 38-54 to be largely off point, I believe there are fundamental flaws in that analysis and that it is important to point those out, given the deleterious impact they will have on future takings cases.

¶ 187 As noted, the Court addresses the question of whether the alternative livestock ranch licenses themselves are compensable property interests. The Supreme Court has said that for purposes of the Fifth Amendment, "[property interests] are created and

their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 815 (1984) (internal quotation marks omitted). Thus, in *Monsanto*, the Supreme Court looked to Missouri law to determine whether Monsanto's trade secrets constituted "property." *See Monsanto*, 467 U.S. at 1001-04, 104 S.Ct. at 2872-73. In so doing, the Supreme Court stated that "intangible property rights potected by state law are deserving of the protection of the Taking Clause." *Monsanto*, 467 U.S. at 1003, 104 S.Ct. at 2873. Ultimately, the Supreme Court held that "to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment." *Monsanto*, 467 U.S. at 1003-04, 104 S.Ct. at 2873.

¶ 188 In light of this approach, one would expect the Court, in the case at hand, to look to Montana law to determine whether the Ranchers' licenses constitute "property." But that is not what the Court does. Rather, the Court allows the United States Court of Appeals for the Federal Circuit to dictate whether a license granted by the State of Montana is protected "property." *See* Opinion, ¶ 46 ("As stated in [*Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323 (Fed.Cir.2005)], to qualify as compensable property interests, the Licenses must be transferable, exclusive, and free of any 'express

statutory language precluding the formation of a property right. . . .' *Members,* 421 F.3d at 1331. We address each of these requirements in turn, as they apply to the Licenses before us." (ellipsis in original)); Opinion, ¶ 54 ("Accordingly, because the Licenses did not meet the three required criteria for compensability under Members, we conclude the District Court did not err when it held the Licenses were not compensable property interests under the Fifth Amendment of the U.S. Constitution, or Article II, Section 29 of the Montana Constitution."). I do not dispute the validity of the Federal Circuit's test vis-à-vis federally created property interests. Indeed, all of the cases from which the Federal Circuit synthesized its test involved licenses or permits granted by the federal government. *See Members,* 421 F.3d at 1330-31. But why should the Federal Circuit's test define what constitutes a compensable property interest under Montana law? The Court offers no explanation, and I can conceive of no valid reason – particularly when Montana law does provide the answer.

¶ 189 As explained in Part II-A of this Dissent, the "existing rules or understandings" related to the Ranchers' licenses, prior to I-143, were as follows. First, as the State acknowledged during oral argument, "it was the policy of the political branches of government to encourage people to look at game farming as an alternative to traditional agriculture – actually, to subsidize traditional agriculture so they could stay on the farms and ranches." *See* § 87-4-431, MCA (1999) ("The legislature recognizes that the

production of alternative livestock provides a viable economic opportunity for any private property owner as well as the traditional livestock producers who are interested in diversifying their ranch productivity."). The licenses were issued and annually renewed in facilitation of this "viable economic opportunity." Second, renewal of the licenses was a matter of right, upon payment of the renewal fee and compliance with all recording and reporting requirements. Section 87-4-412(1), MCA. Third, the license could not be revoked except if the licensee had violated the law or otherwise engaged in misconduct related to the operation of the alternative livestock ranch. Sections 87-4-423(1), -427(1), MCA. Fourth, the license was transferable. Section 87-4-412(2), MCA.

¶ 190 Given these rules and understandings, it is clear that the Ranchers' licenses had several traditional hallmarks of property, including "the right to possess, use and dispose of [them]." *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82 n. 6, 100 S.Ct. 2035, 2041 n. 6, 64 L.Ed.2d 741 (1980) (internal quotation marks omitted). The Ranchers could – and did – use their licenses in the furtherance of their businesses. The Ranchers could sell, assign, or otherwise transfer their licenses. The Ranchers had statutorily guaranteed security in the continued possession of their licenses and, correspondingly, their ability to pursue this "viable economic opportunity." It seems patently obvious to me that in their alternative livestock ranch licenses, the Ranchers had property rights which were protected by Montana law and, as

such, are deserving of protection under the Takings Clause. *Monsanto,* 467 U.S. at 1003-04, 104 S.Ct. at 2873.

¶ 191 Additional "background principles" of Montana property law further support the conclusion that the Ranchers' licenses are "property" for Takings Clause purposes. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030, 112 S.Ct. 2886, 2901, 120 L.Ed.2d 798 (1992). For one thing, the Montana Code contains a provision actually categorizing "licenses" as "property." *See* § 15-6-218(2)(a), MCA. Notably, of the other items of "property" set forth in § 15-6-218(2)(a), MCA (certificates of stock, bonds, promissory notes, copyrights, patents, trademarks, contracts, software, and franchises), several have already been recognized as "property" within the meaning of the Takings Clause. *See Boyle v. United States,* 200 F.3d 1369, 1374 (Fed.Cir.2000) (copyrights); *Roth v. Pritikin,* 710 F.2d 934, 939 (2d Cir.1983) (same); *Leesona Corp. v. United States,* 220 Ct.Cl. 234, 599 F.2d 958, 964 (1979) (patents); *Cienega Gardens v. United States,* 331 F.3d 1319, 1329 (Fed.Cir.2003) (contracts); *Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (same); *City of Oakland v. Oakland Raiders,* 183 Cal.Rptr. 673, 646 P.2d 835, 839-40 (1982) (patents, franchises, and contracts).

¶ 192 Our decision in *Seven Up Pete Venture v. State,* 2005 MT 146, 327 Mont. 306, 114 P.3d 1009, is also informative here. We held in *Seven Up Pete* that the enactment of I-137 did not constitute an

unconstitutional taking since the Venture had not acquired an operating permit to mine using cyanide prior to I-137's enactment and since the State retained substantial contractual and regulatory discretion regarding the issuance of such a permit. *See Seven Up Pete,* ¶¶ 32-33. Of particular relevance, we reasoned:

> [T]he passage of I-137 did not take away any *existing* permits or halt any *on-going* mine operations related to the Venture's projects. Because the Venture had not obtained the requisite operating permit, it likewise had not obtained a right to mine. Moreover, it was not assured of ever obtaining such a right. Therefore, we conclude that the enactment of I-137 did not constitute an unconstitutional taking.

Seven Up Pete, ¶ 33 (emphases added). It follows logically from this reasoning that under Montana law, the issuance of a permit or license is a significant act upon which a taking may be premised. Indeed, we dismissed the Venture's takings claim because it did not have an "existing" permit and because I-137 did not halt any "on-going" mine operations. In contrast, the Ranchers did have "existing" licenses; annual renewal of the licenses was a matter of right; and I-143 did halt "on-going" alternative livestock ranching operations – all of which indicates that the Ranchers had compensable property interests in their licenses.

¶ 193 To all of this, I would simply note that, contrary to the Court's recitation of the law in this area, courts have found government-issued licenses to be compensable property interests. *See e.g. Redevelopment Authority of Philadelphia v. Lieberman,* 461 Pa. 208, 336 A.2d 249 (1975); *State v. Saugen,* 283 Minn. 402, 169 N.W.2d 37 (1969). Notably, in *Stallinger v. Goss,* 121 Mont. 437, 193 P.2d 810 (1948), this Court observed: "Section 6672 of the Revised Codes of Montana 1935, defines personal property: 'Every kind of property that is not real is personal.' A retail liquor license is saleable and is personal property of value and subject to attachment." *Stallinger,* 121 Mont. at 438, 193 P.2d at 810. It would be a peculiar proposition to hold that a government-issued license is "personal property of value" for purposes of sale and attachment, but that it loses this quality for purposes of governmental appropriation.

¶ 194 The Court concedes that the Ranchers' licenses were transferrable. Opinion, ¶ 47. The Court also concedes that neither Title 87, chapter 4, part 4, MCA, nor the licenses themselves contained any express language precluding the formation of a compensable property interest. Opinion, ¶ 48. Instead, the Court points out that a licensee was required to comply with applicable laws and regulations and that the State retained the power to amend the regulations or to revoke the license if the alternative livestock ranch was being operated in violation of the law. Opinion, ¶¶ 49-50. The Court also points out that at common law, wild animals were not subject to

private ownership "'except in so far as the state may choose to make them so.'" Opinion, ¶ 50 (quoting *Rosenfeld v. Jakways,* 67 Mont. 558, 562, 216 P. 776, 777 (1923)). These points, however, miss the mark. Indeed, as the Court itself acknowledges in the very next breath, the government does not have the right (absent just compensation) to withdraw benefits it has conveyed or to qualify those benefits as it chooses when "the statute itself or surrounding circumstances" indicate that the conveyances were "intended to be irrevocable." Opinion, ¶ 50 (internal quotation marks omitted). Here, at the risk of belaboring the point, the statutory scheme clearly provided that a license to "acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of the alternative livestock and their progeny in any quantity and at any time of year" was intended to be irrevocable, except if the licensee engaged in misconduct. Sections 87-4-412(1), -414(2), -423(1), -427(1), MCA (1999). There is neither evidence nor argument in this case that the Ranchers engaged in misconduct.

¶ 195 Lastly, the Court contends that the Ranchers did not have the right to exclude others from entering the alternative livestock industry. Opinion, ¶¶ 51-53. On this basis, the Court concludes that the Ranchers' licenses "did not meet the three required criteria for compensability under *Members*" and, thus, are not compensable property interests. Opinion, ¶ 54. The Court never explains, however, why an inability to exclude others from entering the industry is dispositive of the "property" question. The

Ranchers do not claim a property right in the alternative livestock industry, so why would they need to exclude others from it? Rather, according to the Court, they claim a property right in their licenses, and each Rancher obviously had title in his or her license to the exclusion of all others. In any event, the Court is flat wrong in asserting that the right to exclude is dispositive of the "property" question. "Precedent shows that the ability to exercise every one of the 'sticks' (rights) in the 'bundle' of fee simple rights at the time of a taking is not a prerequisite to establishing a valid property interest under the Fifth Amendment." *Cienega Gardens v. United States,* 331 F.3d 1319, 1329 (Fed.Cir.2003).

¶ 196 In sum, I would hold that under the standards of *Penn Central,* I-143 took from the Ranchers a traditional hallmark of property – the right to transfer their alternative livestock ranch licenses and, correspondingly, their businesses – and that the Ranchers are entitled to just compensation for this taking. Moreover, I disagree with the Court's contention that the licenses themselves are not property entitled to protection under the Takings Clause.

2. The Intangible Business Assets

¶ 197 The Ranchers claim that I-143 took the goodwill and going-concern value of their businesses. It is useful at the outset to define these terms.

¶ 198 "[A]n operating business can have a value in excess of the values of the separate assets that

compose the business." Julius L. Sackman, *Nichols on Eminent Domain* vol. 4, § 13.18[2], 13-169 (3d ed., Matthew Bender 2007). Indeed, in the same way that a person is not just a collection of flesh, bones, and organs, a business is not just the sum of its parts. A going business has value because of its vitality, because of its ability to compete, and because of the synergy of its constituent parts which enable it efficiently to manufacture a good, market a product, or provide a service. It cannot be gainsaid that the value of a business assessed as a going concern is greater than the value of a business which has been dismantled and sold for its constituent assets (to the extent the assets even have value independent of the business). For instance, witness the difference in value of a farm or ranch sold as a working operation and one whose assets are sold at auction.

¶ 199 This difference is known as "going-concern value," which is "'a term used to explain that assets that are a part of a going concern have greater value than the sum of the values of individual assets.'" *Warnick v. Warnick,* 133 P.3d 997, ¶ 15 n. 6 (Wyo.2006) (quoting Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview,* 49 Bus. Law. 1, 12 (1993)); *see also* Sackman, *Nichols on Eminent Domain* § 13.18 [2], 13-168 (" 'The term may be used to refer either to the total value of a going concern or that portion of the total value that exceeds the value of the other identifiable assets of the business.'" (quoting R. Miles, *Basic Business Appraisal* 19 (John Wiley &

Sons 1984))). Going-concern value also represents "the many advantages inherent in acquiring an operating business as compared to starting a new business with only land, buildings and equipment in place," *Gray Line Bus Co. v. Greater Bridgeport Transit Dist.,* 188 Conn. 417, 449 A.2d 1036, 1039 (1982), such as the avoidance of start-up costs and the ability to realize a higher rate of return than a newly established firm due to greater efficiency in operations, marketing, and administration, *see* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation,* 32 B.C. L.Rev. 283, 289 (1991).

¶ 200 In contrast, "goodwill" is "the expectation of continued public patronage." Section 30-13-121, MCA; *Esselstyn v. Holmes,* 42 Mont. 507, 516, 114 P. 118, 120 (1911). This expectation may be founded on reputation, regular customers, favorable location, good service, high-quality merchandise, capable staff, good relations with suppliers, and similar intangible concepts. *See Baldwin v. Stuber,* 182 Mont. 501, 506-07, 597 P.2d 1135, 1138 (1979); *In re Marriage of Hull,* 219 Mont. 480, 484, 712 P.2d 1317, 1320 (1986); *BAA, PLC v. Acacia Mut. Life Ins. Co.,* 400 Md. 136, 929 A.2d 1, 17 n. 24 (2007); *Dugan v. Dugan,* 92 N.J. 423, 457 A.2d 1, 4-5 (1983); Sackman, *Nichols on Eminent Domain* § 13.18[2], 13-167; 38 Am.Jur.2d *Good Will* § 5 (1999). Thus, goodwill has been defined as "the advantages a business has over competitors as a result of its name, location and owner's reputation."

Russell v. Jim Russell Supply, 200 Ill.App.3d 855, 146 Ill.Dec. 152, 558 N.E.2d 115, 121 (5th Dist.1990).

¶ 201 It is beyond dispute that goodwill and going-concern value are compensable property interests; this fact is recognized under both federal and state law. *See Huntleigh USA Corp. v. United States,* 525 F.3d 1370, 1382 n. 3 (Fed.Cir.2008) ("[G]oing concern value and goodwill are indeed compensable property interests."); *Kimball Laundry Co. v. United States,* 338 U.S. 1, 13, 69 S.Ct. 1434, 1441, 93 L.Ed. 1765 (1949) ("[A]n exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property."); *Los Angeles Gas & Elec. Corp. v. Railroad Commission,* 289 U.S. 287, 313, 53 S.Ct. 637, 647, 77 L.Ed. 1180 (1933) ("This Court has declared it to be self-evident that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, and that this element of value is a property right which should be considered in determining the value of the property, upon which the owner has a right to make a fair return." (internal quotation marks omitted)); §§ 70-1-101, -104(4), MCA (defining "property" to include "such products of labor or skill as . . . the goodwill of a business"); *Esselstyn,* 42 Mont. at 516, 114 P. at 120 ("The goodwill of a business . . . is property capable of transfer, and the owner is entitled to the same protection in the exclusive enjoyment of it as he is in that of his tangible possessions."(citation omitted)).

¶ 202 The question, therefore, is whether I-143 effected a taking of the goodwill and going-concern value of the Ranchers' businesses. In my view, the answer to this question is an obvious "Yes." The District Court found – and I agree – that I-143 had "a significant economic impact on [the Ranchers'] game farm businesses." *See also* Opinion, ¶ 62 ("[I-143] had a significant impact upon the value of their businesses."). Indeed, the Initiative effectively outlawed alternative livestock ranches. In this respect, like the total abrogation of the right to transfer their licenses, the character of the regulation vis-à-vis the Ranchers' goodwill and going-concern value is "extraordinary." *Hodel v. Irving,* 481 U.S. 704, 716, 107 S.Ct. 2076, 2083, 95 L.Ed.2d 668 (1987). I-143 was designed to shut down the Ranchers' businesses; it accomplished that purpose; and, in so doing, it fully devalued the goodwill and going-concern value of those businesses. As far as the Ranchers' goodwill and going-concern value are concerned, I-143 is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539, 125 S.Ct. 2074, 2082, 161 L.Ed.2d 876 (2005).

¶ 203 The Court points out repeatedly that the alternative livestock industry was "highly regulated." Notably, the Court does not disclose the legal standard by which an industry may be judged "highly regulated" for purposes of takings analysis. More

importantly, I question whether this fact is entitled to the significance given it by the Court. Indeed,

> the fact that the industry is regulated [is not] dispositive. A business that operates in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever.

Cienega Gardens v. United States, 331 F.3d 1319, 1350 (Fed.Cir.2003); *see also Arctic King Fisheries, Inc. v. United States*, 59 Fed.Cl. 360, 379 (2004) ("[I]ndividuals operating in highly regulated fields do not forfeit their rights under the Fifth Amendment to the whim of whatever regulation the winds may bring."). Here, the Ranchers' investment-backed expectations certainly included the expectation that the regulatory scheme would be adjusted over time, as had been the case over the preceding 75 years. However, I-143 did not "adjust" the regulatory scheme; rather, it rendered the scheme's existence entirely pointless, since none of the businesses in the industry can survive after I-143. I cannot agree with the Court's fanciful suggestion that the Ranchers should have expected the passage of such a regulation, i.e., one that would render all of the other existing regulations moot. *Cf. Cienega Gardens*, 331 F.3d at 1350 (observing that "one would not reasonably expect Congress to make legislative changes that

would actually discourage parties from participating in the programs in the future").

¶ 204 In this connection, I-143 must be distinguished from typical regulations. The Initiative did not *directly* address any of the concerns which led to its passage. I-143 prohibited fee shooting; yet, it cannot plausibly be maintained that the act of paying a fee to shoot alternative livestock is itself the source of chronic wasting disease, the threat to fair-chase hunting ethics, and the discontent over "European style" privatization of wildlife. Rather, the prohibition on fee shooting was a means to an end – namely, to shut down all alternative livestock ranches. Consequently, I-143 differs from regulations that "adjust" the regulatory scheme in order to directly address a matter of public concern, such as the new fencing requirements imposed on alternative livestock ranches over the years and the moratorium placed on new applications for initial alternative livestock ranch licenses until a test for chronic wasting disease is developed and approved. While such regulations may incidentally impact the value of businesses in the industry, they are not even remotely in the same league as I-143, which did not "regulate" alternative livestock ranches in the usual sense, but instead deliberately wiped out the economic viability of these businesses. A voter initiative prompted by dissatisfaction with insurance companies and which permitted such companies to continue issuing policies but prohibited them from charging premiums would achieve much the same result, as would an initiative

that permitted coal-fired generation plants to continue operating but prohibited them from charging for the electricity they provided, or an initiative that permitted oil companies to continue selling gasoline but prohibited them from charging anything at the pump, or an initiative that permitted banks to continue loaning money but prohibited them from charging interest, or an initiative that permitted grain farmers to continue harvesting their crops but prohibited them from charging for their wheat. Obviously, the list is endless.

¶ 205 This case, therefore, does not involve a new regulation that has made operation of a business less profitable or has caused a slight diminution in a business's value. It has been said that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). I-143, however, did not impose additional regulatory burdens on the business of alternative livestock ranching. Rather, it deliberately and effectively legislated all such businesses out of existence. As a result, the values incident to the Ranchers' property were not merely "diminished"; they were largely obliterated. *Cf. Martin v. District of Columbia,* 205 U.S. 135, 139, 27 S.Ct. 440, 441, 51 L.Ed. 743 (1907) ("Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but

to make that limit five feet would require compensation and a taking by eminent domain.").

¶ 206 On one hand, the Court acknowledges that the changes in the regulatory scheme brought about by I-143 were "radical." Opinion, ¶ 6. I agree. On the other hand, however, the Court suggests that the Ranchers should have reasonably anticipated such changes given the "highly regulated" nature of the alternative livestock industry. Opinion, ¶ 93. In so doing, the Court ignores several critical facts supporting the Ranchers' investment-backed expectations in that industry. For one, the Legislature told the Ranchers that alternative livestock ranching was "a viable economic opportunity." Section 87-4-431, MCA (1999). The Ranchers were also assured that they would be allowed to continue operating their alternative livestock businesses so long as they paid the license renewal fees, complied with all recording and reporting requirements, and did not engage in misconduct. Sections 87-4-412(1), -423(1), -427(1), MCA. Now, of course, they are being told that they may continue operating, but that they must do so without any income. The point here, however, is that the regulatory scheme itself engendered reasonable investment-backed expectations. Those, combined with the significant economic impact I-143 had on the Ranchers' businesses and the extraordinary character of the regulation, lead me to conclude that I-143 took the Ranchers' goodwill and going-concern value.

¶ 207 This conclusion is bolstered by precedents from other states, as well as a pre-*Penn Central*

decision of the Supreme Court. Under the business losses rule, when the government condemns the real property upon which a business is operated, the owner recovers only the value of the real property and the fixtures taken. There is no recovery for loss of goodwill and going-concern value, loss of profits, and relocation or removal expenses. *See* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation,* 32 B.C. L.Rev. 283, 286-87 (1991); *see also e.g. United States v. Petty Motor Co.,* 327 U.S. 372, 378-79, 66 S.Ct. 596, 599-600, 90 L.Ed. 729 (1946). One of the justifications for this rule is that the business can still be carried on elsewhere, the goodwill or going-concern value can be transferred with it to the new location without loss of value, and nothing, therefore, has been taken. Oswald, 32 B.C. L.Rev. at 310. Notably, the business losses rule has been subject to withering criticism and has been rejected by a number of courts and legislatures. *See* Oswald, 32 B.C. L.Rev. at 319-75; *State v. Hammer,* 550 P.2d 820, 823-26 (Alaska 1976); *Bowers v. Fulton County,* 221 Ga. 731, 146 S.E.2d 884, 889-91 (1966); *Michigan State Highway Commn. v. L & L Concession Co.,* 31 Mich.App. 222, 187 N.W.2d 465, 468-69 (1971); *Luber v. Milwaukee County,* 47 Wis.2d 271, 177 N.W.2d 380, 383-86 (1970); *City of Janesville v. CC Midwest, Inc.,* 302 Wis.2d 599, 734 N.W.2d 428, ¶ 80 (2007) (Prosser, J., dissenting).

¶ 208 An exception to the business losses rule applies where the business was destroyed or made

otherwise unusable as a result of the governmental action. In *Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), for instance, the government took temporary possession of a laundry, and the Laundry, having no other means of serving its customers, suspended business for the duration of the government's occupancy. *Kimball Laundry,* 338 U.S. at 3, 69 S.Ct. at 1436-37. Thereafter, the Laundry claimed entitlement to compensation for the loss of goodwill and going-concern value during the occupancy. *Kimball Laundry,* 338 U.S. at 8, 69 S.Ct. at 1439. The Supreme Court agreed. The Court first rejected the notion that the intangible nature of these assets precluded recovery, observing that since the Fifth Amendment requires compensation for the value of a business's physical property, it also requires compensation for the value of intangible assets. *Kimball Laundry,* 338 U.S. at 11, 69 S.Ct. at 1440. The Court then discussed the rule that where an owner is free to move his business to a new location, there is no compensation for going-concern value since this asset has not been "taken." *Kimball Laundry,* 338 U.S. at 11-12, 69 S.Ct. at 1440-41. Conversely, the Court observed, this rule does not apply where the owner retains nothing of the going-concern value that he formerly possessed. *Kimball Laundry,* 338 U.S. at 12-13, 69 S.Ct. at 1441. Indeed, the Court stated that "an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property." *Kimball Laundry,* 338 U.S. at 13, 69 S.Ct. at 1441.

Thus, for example, when the government condemns business property with the intention of carrying on the business, "the going-concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it. Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice Holmes, 'the question is, What has the owner lost? not, What has the taker gained?'" *Kimball Laundry,* 338 U.S. at 12, 13, 69 S.Ct. at 1441. The Court concluded that the situation at hand came within this principle. *See Kimball Laundry,* 338 U.S. at 14, 69 S.Ct. at 1442.

¶ 209 The Minnesota Supreme Court reached a similar conclusion in *State v. Saugen,* 283 Minn. 402, 169 N.W.2d 37 (1969). In that case, the government condemned property upon which the condemnee had been operating a lounge. The condemnee had attempted to transfer the going-concern value of the business to another location but could not do so due to a restriction on the transfer of his liquor license The issue on appeal, therefore, was "whether the going-concern value of a liquor lounge, operating under a valid city liquor license, is property taken, destroyed, or damaged by the state's condemnation of the premises for which compensation should be given." *Saugen,* 169 N.W.2d at 39. The court first held that neither the intangible character of going-concern value nor the fact that the lounge was operated under the authority of a license precluded compensation for a taking. *Saugen,* 169 N.W.2d at 39-42. The court then acknowledged "the general rule that loss

of going-concern value is not recoverable on condemnation." *Saugen,* 169 N.W.2d at 42. However, the court held that this rule was inapplicable given that the condemnee had been unable to relocate the business and, therefore, the going-concern value had been effectively destroyed. *See Saugen,* 169 N.W.2d at 46; *see also City of Minneapolis v. Schutt,* 256 N.W.2d 260, 265 (Minn.1977) (stating that compensation for the destruction of going-concern value is permitted where the business "either cannot be relocated as a practical matter, or . . . relocation would result in irreparable harm to the interest").

¶ 210 In *Detroit v. Michael's Prescriptions,* 143 Mich.App. 808, 373 N.W.2d 219 (1985), the court summarized the rule in Michigan as follows:

> [R]ecovery of the going concern value of a business lost to condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required. . . . Generally, however, recovery will be allowed where the business derives its success from a location not easily duplicated or where relocation is foreclosed for reasons relating to the entire condemnation project.

Michael's Prescriptions, 373 N.W.2d at 224-25; *see also L & L Concession,* 187 N.W.2d at 469.

¶ 211 Applying these principles here, the Ranchers' businesses cannot be relocated as a practical matter, since I-143 effectively "outlawed" alternative

livestock ranches in this State. Opinion, ¶ 92. Consequently, the goodwill and going-concern value of the businesses cannot be transferred to a new location. To the contrary, the goodwill and going-concern value have been destroyed by the passage of I-143. As a result, the Ranchers have been completely deprived of these assets. A governmental action which has "the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property." *Kimball Laundry,* 338 U.S. at 13, 69 S.Ct. at 1441.

¶ 212 Before concluding, I again pause to address the Court's approach. The Court acknowledges at the outset that intangibles such as goodwill and going-concern value are "property" under Montana law. Opinion, ¶ 55. The Court also acknowledges that goodwill and going-concern value are compensable property interests under *Kimball Laundry.* Opinion, ¶ 56. Yet, the Court adopts as "true" the District Court's highly questionable assertion that intangibles such as goodwill and going-concern value are compensable only in eminent domain proceedings, and not in the regulatory takings context. Opinion, ¶ 55. I am aware of no authority – and the Court cites none – standing for the proposition that a property interest, for which the owner is entitled to compensation in a direct condemnation action, is not also compensable in a regulatory takings action. I must also confess that the rationale for such a distinction escapes me, particularly given the lack of any textual support for it in the Takings Clause, which simply

states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

¶ 213 Next, the Court attempts to avoid the rule of *Kimball Laundry* by limiting that case to "those rare circumstances where the government actually intends to take over the claimant's business and thereby appropriate the goodwill and going-concern value for its own use." Opinion, ¶ 56. Nothing in *Kimball Laundry* supports this narrow reading of the opinion. To the contrary, the Supreme Court stated:

> [A]n exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable "taking" of property. If such a deprivation has occurred, the going-concern value of the business is at the Government's disposal *whether or not it chooses to avail itself of it.*

Kimball Laundry, 338 U.S. at 13, 69 S.Ct. at 1441 (emphasis added, citations omitted).

¶ 214 The critical fact in *Kimball Laundry* was not the government's "intent" (Opinion, ¶ 56) or "actual physical occupation" of the laundry (Opinion, ¶ 57). Rather, it was the inability of the Laundry to transfer its going-concern value to another location. *Kimball Laundry,* 338 U.S. at 14-16, 69 S.Ct. at 1442-43. Moreover, the Court should take note that "'the Constitution measures a taking of property not

by what a State says, or by what it intends, but by what it *does*.'" *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621, 652-53, 101 S.Ct. 1287, 1304, 67 L.Ed.2d 551 (1981) (Brennan, Stewart, Marshall, & Powell, JJ., dissenting) (quoting *Hughes v. Washington,* 389 U.S. 290, 298, 88 S.Ct. 438, 443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring) (emphasis in *Hughes*), and citing *Davis v. Newton Coal Co.,* 267 U.S. 292, 301, 45 S.Ct. 305, 306, 69 L.Ed. 617 (1925)). Notably, in attempting to limit *Kimball Laundry,* the Court places the focus of the analysis on what the State gained. This approach is contrary to the rule that our focus must be on what the property owner lost. *Kimball Laundry,* 338 U.S. at 13, 69 S.Ct. at 1441 ("'[T]he question is, What has the owner lost? not, What has the taker gained?'"); *see also United States v. Causby,* 328 U.S. 256, 261, 66 S.Ct. 1062, 1065-66, 90 L.Ed. 1206 (1946). From the Ranchers' perspective, there is no difference between the State's taking over their businesses, thereby appropriating the goodwill and going-concern value for its own use, and the State's shutting down the businesses through a regulatory enactment so that no one can operate them at all. The Court's attempt to distinguish the two is pure sophistry.

¶ 215 Lastly, the Court posits that "taking of goodwill or going-concern value differs markedly from other types of taking." Opinion, ¶ 57. The Court speculates that "[t]his is likely because what the claimant alleges has been 'taken' is an expectation of fu ture profitability." Opinion, ¶ 57. Proceeding on this

assumption, the Court cites and discusses a number of cases for the proposition that an expectation of future profitability is not a compensable property interest. Opinion, ¶¶ 57-62. At the conclusion of these citations, the Court baldly rewrites the Ranchers' claim that I-143 took their "intangible business assets" as a claim that I-143 took their "ability to profit from fee-shooting." Opinion, ¶ 63. Having thus transformed the Ranchers' claim, the Court reaches the conclusion that the Ranchers' "ability to profit from fee-shooting" is not compensable "because there has been no physical condemnation or occupation of [the Ranchers'] property by the State." Opinion, ¶ 63.

¶ 216 This conclusion is truly perplexing. For one thing, the Court expends several pages arguing that an expectation of future profitability is not a compensable property interest, only to reach the conclusion that an ability to profit *is* compensable if the State physically condemns or occupies the business. Moreover, I am not persuaded that an "ability to profit from fee-shooting" is compensable if the State "physically condemns or occupies" the Ranchers' property but is not compensable if the State simply passes a regulation putting the Ranchers out of business. That the Court treats these two scenarios as constitutionally distinct, without a shred of authority for support, is troubling.

¶ 217 Ultimately, however, the distinction is irrelevant because the Ranchers do not claim a taking of their "ability to profit from fee-shooting." What they claim, rather, is that I-143 took the goodwill and

going-concern value of their businesses. These are existing, quantifiable, and compensable property interests, recognized as such in the cases cited above. Where the government deprives an owner of the goodwill and going-concern value of his business, it is a compensable taking of property. *Kimball Laundry,* 338 U.S. at 13, 69 S.Ct. at 1441. In my view, that proposition is sufficient to resolve the Ranchers' claims with respect to their intangible business assets.

¶ 218 In sum, I would hold that I-143 took the goodwill and going-concern value of the Ranchers' businesses and that the Ranchers are entitled to just compensation for this taking. Moreover, I disagree with the Court's entire discussion at ¶¶ 55-64. In order to reject the Ranchers' legitimate takings claims, the Court manufactures a novel new rule: Although a business owner may be deprived of the goodwill and going-concern value of his business by either regulation or direct appropriation, he is entitled to compensation only in the latter circumstance. There is no logical reason, no persuasive justification, and no legal authority offered in support of this incongruous rule. What the Court fails to recognize is that the ultimate question in a Fifth Amendment regulatory takings analysis is whether the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 537, 125 S.Ct. 2074, 2081, 161 L.Ed.2d 876 (2005). Certainly, if a regulation is so onerous that its effect is tantamount to a direct

appropriation of goodwill or going-concern value – and I-143 is such a regulation – then just compensation is required.

3. The Real Estate Interests and Fixtures

¶ 219 Given the prolonged discussions under the two preceding categories, only a brief discussion is necessary here. First, I tend to agree with the Court's conclusion that I-143 did not take the Ranchers' real estate. Opinion, ¶ 80. However, there is a glaring omission from the Court's discussion: an analysis of the fixtures. The Court's heading reads, "Appellants' Real Estate Interests and Fixtures," and the Court mentions fixtures several times in ¶¶ 80-83. Yet, nowhere is there a discrete analysis of the fixtures. Rather, the Court seems to lump them together with the land. This, in my view, is error. The Ranchers installed a number of fixtures on their property specifically designed for the purpose of operating alternative livestock ranches, including fences and certain outbuildings. To the extent I-143 has rendered these fixtures valueless, I conclude that the Ranchers are entitled to just compensation for essentially the same reasons I concluded above that they are entitled to just compensation for the loss of their right to transfer their alternative livestock ranch licenses and businesses and for the loss of their intangible business assets.

4. The Alternative Livestock

¶ 220 The last category is the Ranchers' alternative livestock. Everyone agrees that the alternative livestock is a compensable property interest. *See* Opinion, ¶ 66. Thus, the question is whether this property was "taken" under the *Penn Central* standards.

¶ 221 The Court observes that the Ranchers' alternative livestock suffered "significant devaluation" as a result of I-143 and that the diminished value was insufficient even to cover the cost of raising and maintaining the livestock. Opinion, ¶¶ 84, 85. As a matter of fact, the Ranchers can sell their alternative livestock only at a loss. Opinion, ¶ 85. The Court concludes, therefore, that the economic-impact factor "weighs in favor of finding a compensable taking" of the alternative livestock. Opinion, ¶ 85. I generally agree with these observations; however, given that I-143 devalued the alternative livestock by 70 to 95 percent, Opinion, ¶ 84, and given that the primary focus of our analysis is on "the severity of the burden that [I-143] imposes upon private property rights," *Lingle,* 544 U.S. at 539, 125 S.Ct. at 2082, I conclude that the economic-impact factor weighs *very heavily* in favor of the Ranchers' claims.

¶ 222 The Court next addresses the character of the governmental action. Opinion, ¶¶ 86-88. The Court acknowledges that I-143 placed the economic burden of eliminating alternative livestock ranches "squarely on the shoulders" of the individuals in the

industry and that "individuals like [the Ranchers], and not the public as a whole, are being asked to bear the burden." Opinion, ¶ 86. This, the Court recognizes, "seems to run afoul" of the rule that the State may not "'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Opinion, ¶ 86 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). On all of these points, I agree.

¶ 223 I do not agree, however, with the Court's subsequent attempt to downplay I-143's intrusion on the Ranchers' property rights as "slight" and "minimal." Opinion, ¶¶ 87, 88. The Court points out that the State has not seized the Ranchers' alternative livestock. True, but the alternative livestock no longer have any economically viable use, as the Court itself acknowledges in ¶ 85 (noting that the value of the livestock is "insufficient to even cover the cost of raising and maintaining [them]" and that the Ranchers "could only sell the alternative livestock at a loss"). That is tantamount to seizing the alternative livestock. *Cf. Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1017, 112 S.Ct. 2886, 2894, 120 L.Ed.2d 798 (1992) ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."). The Court also contends that I-143 merely prohibited one use of the Ranchers' alternative livestock and left them open to exploit other uses of the livestock. For instance, the Court proposes that the Ranchers could sell the

alternative livestock (admittedly, at a loss) to out-of-state markets or "allow others to shoot [the alternative livestock] in Montana, so long as no fee is charged." Opinion, ¶ 87. However, these entirely unprofitable (not to mention implausible) uses of the alternative livestock only persuade me further that I-143's impact is far from "slight" and "minimal."

¶ 224 The Court's attempt to analogize this case to *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), is similarly unpersuasive. *Andrus* involved federal regulations promulgated pursuant to the Eagle Protection Act and the Migratory Bird Treaty Act. The regulations prohibited commercial transactions in parts of birds that had been legally killed before the birds came under the protection of the Acts. The appellees were engaged in the trade of Indian artifacts composed partly of the feathers of protected birds, and these artifacts existed before the regulations went into effect. One of the issues on appeal, therefore, was whether "the Eagle Protection and Migratory Bird Treaty Acts violate appellees' Fifth Amendment property rights because the prohibition [on commercial transactions in preexisting avian artifacts] wholly deprives them of the opportunity to earn a profit from those relics." *See Andrus,* 444 U.S. at 52-55, 64, 100 S.Ct. at 320-21, 326.

¶ 225 In answering this question, the Supreme Court observed that the challenged regulations neither compelled the surrender of, nor imposed a physical restraint on, the artifacts; rather, they imposed a restriction on one means of disposing of the artifacts.

Andrus, 444 U.S. at 65, 100 S.Ct. at 327. The Court acknowledged that the regulations prevented "the most profitable use" of the appellees' property; at the same time, however, it was "not clear that appellees will be unable to derive economic benefit from the artifacts." *Andrus,* 444 U.S. at 66, 100 S.Ct. at 327. The Court ultimately concluded that in the absence of any physical property restriction, the reduction in profits – i.e., the difference between the most profitable use of the property pre-regulation and the most profitable use of the property post-regulation – was too speculative and, thus, "a slender reed upon which to rest a takings claim." *Andrus,* 444 U.S. at 66, 100 S.Ct. at 327. Hence, the Court held that the prohibition on the sale of the bird feathers did not amount to a taking. *Andrus,* 444 U.S. at 67-68, 100 S.Ct. at 328.

¶ 226 As an initial matter, the extent to which the holding of *Andrus* may be extended beyond the specific facts of that case is questionable. *See Hodel v. Irving,* 481 U.S. 704, 719, 107 S.Ct. 2076, 2085, 95 L.Ed.2d 668 (1987) (Scalia, J., Rehnquist, C.J., & Powell, J., concurring) (concluding that "in finding a taking today our decision effectively limits *Allard* to its facts"); *but see Irving,* 481 U.S. at 718, 107 S.Ct. at 2084 (Brennan, Marshall, & Blackmun, JJ., concurring) ("I find nothing in today's opinion that would limit *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), to its facts."). But, setting that question aside, the character of the governmental action in *Andrus* is, in any event, totally

distinguishable from the character of the governmental action here.

¶ 227 The regulations at issue in *Andrus* were designed to prevent the destruction of certain species of birds, which in turn caused an incidental reduction in profits for those engaged in the trade of Indian artifacts. But the appellees still had the opportunity to use their property in other economically viable ways. *Andrus,* 444 U.S. at 66, 100 S.Ct. at 327. I-143, by contrast, was not designed to regulate the use, care, or disposal of alternative livestock. Rather, it was designed to regulate the price of penned hunts so as to eliminate the alternative livestock's value completely. It is important, in this regard, to recall that the Sportsmen's concerns in drafting I-143 were with chronic wasting disease ("CWD"), unethical hunting, and private ownership of game animals. Obviously, all of these concerns could be resolved in one fell swoop by simply seizing the alternative livestock and prohibiting private ownership of game animals, but such action clearly would require the payment of compensation. Alternatively, the Sportsmen's goals could be achieved if the Ranchers were left with no choice but to get rid of their alternative livestock, but that would not likely occur if the Ranchers were able to derive economic benefit from them. Thus, the Sportsmen "carefully crafted" I-143 to eliminate all economically beneficial use of the alternative livestock.

¶ 228 Ironically, in so doing, and in spite of their concern with diseases, the Sportsmen gave the

Ranchers an incentive to neglect their alternative livestock and allow them to become diseased. That way, the government would destroy the animals and pay the Ranchers for the loss. *Compare* 9 C.F.R. § 55.2 ("The Administrator is authorized to pay for the purchase and destruction of CWD positive animals, CWD exposed animals, and CWD suspect animals. Subject to available funding, the amount of the Federal payment for any such animals will be 95 percent of the appraised value established in accordance with § 55.3 of this part, but the Federal payment shall not exceed $3,000 per animal."), *with* Opinion, ¶ 84 (observing that the Ranchers were getting between $500 and $1,800 per animal selling them on the market). I-143 and this Court's decision, therefore, create the perverse result that good stewards of animals whose healthy herds are devalued by way of a "carefully crafted" political ploy receive nothing, while those whose herds have become diseased due to careless management receive compensation. One has to wonder where there is "fairness and justice" in such a scheme.

¶ 229 In any event, given that I-143 specifically targets the Ranchers to bear the entire burden of eliminating alternative livestock ranches, and given that I-143, for all intents and purposes, caused "the complete elimination of [the alternative livestock's] value," *Lingle*, 544 U.S. at 539, 125 S.Ct. at 2082 (citing *Lucas*, 505 U.S. at 1017, 112 S.Ct. at 2894); *cf. Yancey v. United States*, 915 F.2d 1534, 1541-42 (Fed.Cir.1990) (finding a compensable taking where

"the Yanceys had no choice but to sell their birds for substantially less than their value"), I conclude that the character of the governmental action weighs heavily in favor of the conclusion that I-143 effected a taking of the Ranchers' alternative livestock.

¶ 230 Lastly, the Court addresses the Ranchers' investment-backed expectations. Opinion, ¶¶ 89-93. The Court acknowledges that the whole reason the Ranchers expended "significant financial resources" on their respective operations was to offer penned hunts. Opinion, ¶ 89. Yet, the Court then asserts that it was unreasonable for the Ranchers "to maintain an investment-backed expectation that they would always be able to charge a fee to shoot alternative livestock in Montana." Opinion, ¶ 89. The Court points out that "the State never assured [the Ranchers] they would always be permitted to charge a fee to shoot alternative livestock in Montana." Opinion, ¶ 92.

¶ 231 With all due respect, the foregoing proposition is preposterous. The right to receive remuneration, in one form or another, for one's lawful goods and services has always been a part of this country's economic system. It is one thing to regulate the prices at which goods and services may be sold, but it is quite another to impose a price ceiling of $0.00. No business would, or should, *ever* expect that the State may require it to offer its goods and services for free. *Cf. Stone v. Farmers' Loan & Trust Co. (Railroad Commission Cases),* 116 U.S. 307, 331, 6 S.Ct. 334, 345, 29 L.Ed. 636 (1886) ("This power to regulate is not a power to destroy, and limitation is not the

equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.").

¶ 232 The Court offers a second theory that is only slightly more plausible than the first. Specifically, the Court asserts that due to "significant public unrest," the Ranchers "knew, or should have known," that alternative livestock ranches were "highly controversial" and that initiative measures could be passed which would outlaw such operations entirely. Opinion, ¶ 92. The Court thus reasons that the Ranchers "could not maintain a reasonable investment-backed expectation" that the industry would not someday be "completely abolished." Opinion, ¶ 93.

¶ 233 There are several flaws – factual as well as legal – with this theory. First, the history of alternative livestock ranching does not support the expectations the Court attributes to the Ranchers. The "public unrest" that led to I-143 was not new. As a matter of fact, the 1982 Game Farm Task Force was created specifically to address then-existing public concerns and controversy surrounding alternative livestock ranching. *See* Part II-A, *supra*. But that controversy did not lead to the out-and-out elimination of the industry. To the contrary, it resulted in a compromise involving, on one hand, the imposition

of new requirements on alternative livestock ranch operations and, on the other hand, the codification of certain "rights" designed to protect the interests of participants in the alternative livestock industry. Thus, if the Ranchers should have expected a change due to the "public unrest" existing in the 1990s, additional safety and testing requirements are far more plausible than a regulation designed to put them out of business by prohibiting remuneration for penned hunts. Indeed, the Court acknowledges that the changes in the regulatory scheme brought about by I-143 were "radical." Opinion, ¶ 6.

¶ 234 Second, and along these same lines, it is important to recall that nothing in the "public unrest" prior to I-143 had anything to do with the size of the fees the Ranchers were charging for penned hunts or the fact that fees were being charged. Therefore, even if the Ranchers should have anticipated some adjustments to the regulatory scheme, a prohibition on charging a fee to shoot alternative livestock cannot fairly be categorized as one such adjustment-especially since penned hunts are still perfectly legal, as long as they are conducted for free.

¶ 235 Third, notwithstanding the "public unrest" to which the Court refers, the 1999 Legislature passed a statute which read: "The legislature recognizes that the production of alternative livestock provides a viable economic opportunity for any private property owner as well as the traditional livestock producers who are interested in diversifying their ranch productivity." Section 87-4-431, MCA. It is

quite far-fetched to assert, as the Court does, that the Ranchers should have anticipated the State was on the verge of abolishing alternative livestock ranching when the Legislature, meanwhile, was passing a statute characterizing the activity as "a viable economic opportunity." Given that alternative livestock ranching had been a lawful "business or occupation" in this State for over 75 years, and given that an alternative livestock ranch license was renewable as a matter of right and could not be revoked unless the licensee engaged in misconduct, §§ 87-4-412(1), -423(1), -427(1), MCA, it was far more reasonable for the Ranchers to maintain investment-backed expectations that their ability to continue operating their alternative livestock ranches was secure.

¶ 236 Lastly, at a more fundamental level, I question the Court's reliance on what the Ranchers "knew, or should have known." The Court opines that a regulation does not take property if it was "reasonably anticipated." Opinion, ¶ 93. But if the notion of a "regulatory taking" is to have any vitality, then the Court's theory must be roundly rejected. It is unlikely in today's world, where regulations of property are prevalent, that any property owner could *ever* argue that a particular regulation was unexpected or not reasonably anticipated. "[E]xcept for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation." *District Intown Properties v. District of Columbia,* 198 F.3d 874, 887 (D.C.Cir.1999)

(Williams, J., concurring in the judgment). If the meaning of "taking" may be qualified by the degree to which a regulation is "reasonably anticipated," then "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

¶ 237 That is exactly the untenable result under the Court's approach: A business that operates in an industry with a history of regulation must expect that the regulations may be strengthened to achieve public needs, and this expectation, in turn, negates any entitlement the business might otherwise have to compensation for a taking. Indeed, this expectation, according to the Court, outweighs even a "significant devaluation" of property disproportionately placed on the business. Such an approach drains the doctrine of "regulatory takings" of all force and purpose. There is no basis in logic or in the Takings Clause for distinguishing between two equally burdened property owners on the ground that one of them had advance notice of the regulation while the other was caught completely off guard. Either private property rights were taken, or they were not. If the former, just compensation must be paid, irrespective of the amount of notice the property owner had of the regulation's enactment.

¶ 238 In my view, the Ranchers' had reasonable investment-backed expectations related to their alternative livestock, given the long history of alternative

livestock ranching, the statutory provisions designed to protect the interests of participants in the industry, and the Legislature's pronouncement that this activity was "a viable economic opportunity." I conclude that this factor weighs in favor of the Ranchers' claims.

¶ 239 Having analyzed the three *Penn Central* factors, I would hold that the Ranchers are entitled to just compensation for the "substantial devaluation" of their alternative livestock. While we may disagree as to the reasonableness of the Ranchers' investment-backed expectations in light of the "significant public unrest," I believe that the three factors, taken together, mandate the conclusion that I-143 effected a taking of the Ranchers' alternative livestock. Both the economic impact of I-143 on the value of the alternative livestock and the character of the regulation weigh heavily in favor of this conclusion.

5. Conclusion of Fifth Amendment Analysis

¶ 240 In conclusion, based on the foregoing *Penn Central* analysis, I would hold that I-143 effected a taking of the Ranchers' right to transfer their alternative livestock ranch licenses and businesses, of the goodwill and going-concern value of their businesses, of the fixtures related to their alternative livestock operations, and of their alternative livestock. I would further hold that the Ranchers are entitled to just compensation for these takings. I

would reverse the District Court's judgment and remand for further proceedings related to the issue of just compensation.

IV. CONCLUSION

¶ 241 *You take my house, when you do take the prop*

That doth sustain my house; you take my life,

When you do take the means whereby I live.[6]

¶ 242 Arguably, I-143 was a fraud on the voters. It purported to address a number of "problems" associated with alternative livestock ranching, but it did not actually address any of those problems – at least, not directly. Instead, it eliminated the means whereby the Ranchers businesses existed, thereby destroying those businesses. The voters were not told that the Initiative was a "carefully crafted" end – around the Constitution that could lead to a decision from this Court holding that the State may destroy the goodwill and going-concern value of a Montana business, substantially (if not completely) devalue the business's assets, and deprive the business owner of her right to sell, assign, or otherwise transfer the business – all without having to pay just compensation.

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[6] William Shakespeare, The Merchant of Venice, Act IV, Scene 1, lines 375-77.

¶ 243 The Court invokes notions of "fairness and justice" to deny the Ranchers any compensation for the out-and-out obliteration of their businesses. I-143 was designed to shut down an industry that the State had facilitated, and even encouraged, for 83 years and to place the entire economic burden of doing so on the participants in that industry. It is difficult to see any fairness or justice in this bait and switch, particularly since the Initiative was promoted as addressing legitimate public concerns shared not only by the Sportsmen, but by the public as a whole. A majority of voters – specifically, 204,282 of them – believed that the concerns cited by I-143's Proponents warranted "game farm reform." Given the severity of the burden this "reform" entailed, and given that the "reform" was intended to benefit all of Montana, fairness and justice require that the burden be spread among taxpayers through the payment of compensation, not disproportionately placed on the shoulders of the alternative livestock ranchers.

¶ 244 The economic impact on the Ranchers' various assets as a result of I-143 is unquestionably substantial. The character of the governmental action – total abrogation of property rights in and related to the Ranchers' businesses – is extraordinary. And the Ranchers' distinct investment-backed expectations in their ability to continue operating their businesses were quite reasonable in light of the history of alternative livestock ranching and the various as surances set out in the statutory scheme. "[W]hile property may be regulated to a certain extent, if

regulation goes too far it will be recognized as a taking." *Mahon,* 260 U.S. at 415, 43 S.Ct. at 160. In light of the foregoing, I-143 went too far, and just compensation is due.

¶ 245 Aside from the immediate impact of the Court's decision on the Ranchers, the Opinion will, obviously, serve as precedent in future Montana takings cases. This Dissent is long – and will, no doubt, be criticized by some for that. However, I believe that the important issues implicated by the Ranchers' takings claims justified setting out, in detail, the reasons why federal takings jurisprudence is confused, often inconsistent, certainly not bullet-proof, and not necessarily worthy of this Court's "marching lockstep" with it. I hope this Dissent will give some future takings litigant the impetus and ammunition to challenge federal caselaw in arguing that her facially broader fundamental rights under Article II, Section 29 should be upheld.

¶ 246 Additionally, I am very concerned that the Court's decision here will be used – and, more likely, misused – in government's ever-expanding reach to regulate – and, ultimately, take – Montanans' broadly-defined property rights, without having to assume and spread amongst all taxpayers the economic burdens of that regulation and taking. Similarly, I am concerned that today's decision will encourage more "carefully crafted" initiatives and legislation which end-run constitutional guarantees and mislead voters with smoke and mirrors. Finally, I am concerned that, recognizing "If they can do it to

them, they can do it to me," citizens will propose and enact initiatives of the recent I-154 ilk-poorly drafted, overbroad, and underinclusive. Indeed, we invite the Legislature to enact laws to protect constitutional rights when this Court refuses to define and enforce those rights.

¶ 247 It is for all of these reasons I would hold that the Ranchers have established compensable property interests and have demonstrated that those property interests were "taken" under the Fifth Amendment. I would reverse the District Court's judgment and remand this case for further proceedings on the issue of just compensation.

¶ 248 Therefore, I respectfully dissent from the Court's contrary decision.

Justice JIM RICE and District Court Judge WM. NELS SWANDAL, sitting for Justice BRIAN MORRIS, join the Dissent of Justice JAMES C. NELSON.

Mont.,2008.

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